EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 2160

United States Circuit Court of Appeals
for the Ninth Circuit.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Plaintiff in Error,

vs.

ELI MELOVICH,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

Records of U. S. Circuit
Court of Appeals
744

No.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Plaintiff in Error,

vs.

ELI MELOVICH,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

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In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff and Defendant in Error,

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant and Plaintiff in Error.

No. 1934.

NAMES AND ADDRESSES OF COUNSEL.

JAMES A. KERR, Esq.,
1309 Hoge Building, Seattle, Washington.
Attorney for Defendant and Plaintiff in Error.

E. S. McCORD, Esq.,
1309 Hoge Building, Seattle, Washington.
Attorney for Defendant and Plaintiff in Error.

HERBERT W. MEYERS, Esq.,
432 Pioneer Building, Seattle, Washington.
Attorney for Plaintiff and Defendant in Error.

CHAS. A. ENSLOW, Esq.,
430 Pioneer Building, Seattle, Washington.
Attorney for Plaintiff and Defendant in Error.

ELI MELOVICH,

Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION,

Defendant.

No. 77554.

RECORD ON REMOVAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF KING, TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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In the Superior Court of the State of Washington, for King County.

ELI MELOVICH,
Plaintiff,

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. .....

MOTION.

Comes now the above named defendant and moves the court for an order requiring plaintiff to strike from his complaint and make said complaint more definite and certain as is hereinafter set out:

I.

Referring to paragraph four therein to strike that part beginning with the word "that" in the first line thereof and ending with the word "gears" in the seventh line thereof for the reason that said part is a conclusion.

II.

Referring to paragraph six of said complaint to strike therefrom that part of said paragraph beginning with the word "employment" in the fourth line thereof, and ending with the word "agent" in the sixth line thereof, for the reason that said part is a conclusion.

III.

And to further strike from said paragraph six that part beginning with the word "that" in the fortieth line thereof and ending with the words "Slim Dickey" in the forty-ninth line thereof for the reason that said part is wholly immaterial and irrelevant.

IV.

To strike from said sixth paragraph that part thereof beginning with the words "Plaintiff's main work" in the fifty-second line thereof, and ending with the word "aforementioned" in the fifty-fourth line thereof, for the reason that said part is immaterial and redundant.

V.

To strike from said paragraph six of the complaint beginning with the words "and being a foreigner" in the sixty-second line thereof and ending with the word "unprotected machinery" in the sixty-fourth line thereof, for the reason that said part is wholly immaterial and irrelevant.

VI.

Referring to paragraph seven of the complaint, this defendant moves the court for an order requiring plaintiff to strike the whole thereof from the complaint for the reason that said paragraph is redundant.

VII.

Referring to paragraph eight of said complaint, defendant moves the court for an order to strike the whole thereof from said complaint, for the reason that said paragraph is wholly immaterial.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King—ss.

J. A. Kerr being first duly sworn, on oath says, that he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing motion, knows the contents thereof and believes the same to be meritorious and well founded in law.

J. A. KERR.

Subscribed and sworn to before me this 7th day of Defendant, 1910.

J. N. IVEY,
Notary Public in and for the State of Washington,
residing at Seattle.

Copy of within motion received and due service of same acknowledged this 7th day of December, 1910.

IVAN BLAIR,
Attorneys for Plaintiff.

Filed Dec. 10, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington, for King County.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING COPORATION, a Corporation, *Defendant.*	No. 77554. PETITION FOR REMOVAL

To the Honorable Superior Court of the State of Washington for King County:

Your petitioner respectfully shows to this Honorable Court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars, and that the controversy in said suit is between citizens of different states; that your petitioner, the defendant in the above entitled suit, was at the time of the commencement of said suit and still is a resident of the City of Boston, State of Massachusetts, and a non-resident of the State of Washington; that your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts and that its principal place of business is in the City of Boston, State of Massachusetts, and that the plaintiff was at the time of the commencement of this action and still is a resident of King County, State of Washington. Your petitioner offers herewith a good and sufficient surety for its entering into the Circuit Court of the United States for the Western District of Washington, Northern Division, on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by the Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner alleges that it has a good and meritorious defense in the above entitled cause.

Your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into the Circuit Court of the

United States in and for the Western District of Washington, Northern Division, and it will ever pray.

STONE & WEBSTER ENGINEERING COPORATION,
By Kerr & McCord.
Its Attorneys.

State of Washington,
County of King—ss.

J. A. Kerr, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the petitioner above named; that he has read the foregoing petition for removal and knows the contents thereof and believes the same to be true.

J. A. KERR.

Subscribed and sworn to before me this 7th day of December, A. D. 1910.

J. N. IVEY,
Notary Public in and for the State of Washington,
residing at Seattle.

State of Washington,
County of King—ss.

On this 7th day of December, A. D. 1910, in the County of King, State of Washington, before me a Notary Public in and for said State of Washington, personally appeared J. A. Kerr, to me known to be the individual who executed the foregoing petition, and then and there acknowledged to me that he executed the same for and on behalf of the petitioner Stone & Webster Engineering Corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

J. N. IVEY,
Notary Public in and for the State of Washington,
residing at Seattle.

The foregoing and within petition is hereby on this 10th day of December, 1910, granted in open court.

JOHN F. MAIN, Judge.

Copy of within Petition for Removal received and due service of same acknowledged this 7th day of December, 1910.

IVAN BLAIR,
Attorneys for Plaintiff.

Filed Dec. 10, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH, *Plaintiff.* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. ..... BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS: That Stone & Webster Engineering Corporation, a corporation, as principal, and the National Surety Company of New York, a corporation organized under the laws of the State of New York, and duly authorized to transact a surety business in the State of Washington, as surety, are holden and stand firmly bound unto Eli Melovich, in the penal sum of Five Hundred Dollars, for the payment of which well and truly to be made unto the said Eli Melovich, his heirs, representatives and assigns, they bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Upon condition nevertheless that whereas the said Stone & Webster Engineering Corporation has petitioned the Superior Court in and for King County, State of Washington, for the removal of a certain cause pending therein, wherein the said Eli Melovich is plaintiff and the said Stone & Webster Engineering Corporation is defendant, to the Circuit Court of the United States for the Western District of Washington, Northern Division;

Now if the said Stone & Webster Engineering Corporation shall enter into the said Circuit Court of the United States on the first day of its next term, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF the said Stone & Webster Engineering Corporation has caused these presents to be executed by its attorneys, and the National Surety Company has caused these presents to be executed by its Resident Vice-President, Resident Assistant Secretary, this 7th day of December, A. D. 1910.

STONE & WEBSTER ENGINEERING CORPORATION,
By Kerr & McCord, Its Attorneys.

NATIONAL SURETY COMPANY,

(Seal) By Robt. A. Hulbert, Resident Vice-President.

Attest: Geo. W. Allen, Resident Assistant Secretary.

Approved Dec. 10, 1910. John F. Main, Judge.

Filed Dec. 10, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.
No. 77554

Nature of Motion.
Petition for removal.
Notice of issue of law.
Department No. 3.
Last pleading served Dec. 7, 1910.
To Messrs. Meyers & Blair,
Attorneys for Pltf.

Please take notice that the issue of law in the above entitled cause will be brought for trial on the 10th day of Dec., 1910.

KERR & McCORD,
Attorney for Deft.

I hereby acknowledge receipt of true copy of within note and notice, and admit true service thereof Dec. 7, 1910.

IVAN BLAIR,
Attorney for Pltf.

Filed Dec. 12, 1910. D. K. Sickels, Clerk.

In the Superior Court of the State of Washington for the County of King.

ELI MELOVICH,

vs.

STONE & WEBSTER ENG. CO.

No. 77554.

Saturday, December 10, 1910.

HON. JOHN F. MAIN, Judge.

Order of removal signed.
Bond approved.
Min. Book No. 6.
Page 12.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.
No. 77554.

Wednesday, December 21, 1910.

HON. R. B. ALBERTSON, Judge.

Order of removal signed.
Minute Book No. 3, Page 335.

In the Superior Court of the State of Washington for King County.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. .....

ORDER

This cause coming on regularly for hearing this 21st day of December, A. D. 1910, and it appearing to the Court that heretofore and on the 10th day of December, 1910, a petition for the removal of the above entitled cause to the Circuit Court of the United States for the Western District of Washington, Northern Division, was duly presented and granted and that the bond on removal required by law was duly approved and filed;

It is now by this Court ordered that the above entitled cause be removed into the United States Circuit Court for the Western District of Washington, Northern Division, and that the Clerk of this Court forthwith prepare a complete record of said cause and forward the same to the said United States Circuit Court.

R. B. ALBERTSON, Judge.

Filed Dec. 21, 1910. D. K. Sickels, Clerk.

State of Washington,
County of King—ss.

I, D. K. Sickels, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington, in and for the County of King, do hereby certify that the foregoing is a full, true and correct transcript of the entire record and filed in cause No. 77554, Eli Melovich vs. Stone & Webster

Engineering Corporation as the same appear of record and on file in my office.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court, this 24th day of Dec., A. D. 1910.

(Seal) D. K. SICKELS, Clerk.
By W. K. Sickels, Deputy Clerk.

Filed U. S. Circuit Court. Western District of Washington, Dec. 24, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

APPEARANCE.

To the Clerk of the above Entitled Court:

You will please enter our appearance as attorneys for defendant in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said defendant, by leaving the same with

KERR & McCORD,

Office address: 318 Mutual Life Bldg., Seattle, Washington.

Indorsed: Appearance. Filed U. S. Circuit Court, Western District of Washington, Dec. 24, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

To Eli Melovich and to Iran Blair and Herbert W. Meyers, His Attorneys:

You and each of you will please take notice that the record on removal in the above entitled cause has this 24th day of December, 1910, been filed with the Clerk of the above entitled Court.

KERR & McCORD,
Attorneys for Defendant.

Copy of within Notice received and due service of same acknowledged this 24th day of Dec., 1910.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Notice. Filed U. S. Circuit Court, Western District of Washington, Dec. 27, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Superior Court of the State of Washington in and for the County of King.

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

SUMMONS.

The State of Washington to the Stone & Webster Engineering Corporation, a Corporation, the above named Defendant:

You are hereby summoned and required to appear within twenty days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled cause in the Superior Court of the State of Washington, for King County aforesaid, and answer the complaint of the plaintiff and serve a copy of your answer upon the undersigned attorneys for plaintiff at their offices below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the Clerk of the said Court, a copy of which is herewith served upon you.

HERBERT W. MEYERS,
IVAN BLAIR,
Attorneys for Plaintiff.

Postoffice and Office Address: 430-33 Pioneer Building, Seattle, King County, Washington.

In the Superior Court of the State of Washington in and for King County

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. .....

COMPLAINT.

Plaintiff complains of defendant and alleges:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, maintaining an office in the City of Seattle, State of Washington, with one M. J. Whitson as its resident and statutory agent, and as such is liable to be sued in the Courts of this State.

II.

That the defendant on the 12th day of July, 1910, and prior thereto operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: a concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small buildings, and a large building or structure some sixty (60) feet in height wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery, which said establishment was used by the defendant for the purpose of manufacturing concrete. That the buildings were all of a permanent nature and a part of the concrete manufacturing plant maintained by defendant company in manufacturing concrete for the Snoqualmie

Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and on which cogs and gears the employees of the defendant were liable to come in contact, while in the performance of their duty as such employees, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employees therefrom.

IV.

That it was necessary to the safe operation of the said cogs and gears and to the safety of employees when operating the same that the said cogs and gears should be properly protected and guarded by the use of guards so as to form a shield to ward off and keep the hands and arms of such employees from coming in contact with such cogs and gears; and without such guards it would be dangerous to any employee using the same, all of which was well known to the defendant.

V.

That the defendant on or about the said date and prior thereto failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected.

VI.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in the said establishment, and that by reason of said employment it was the duty of the plaintiff among other things to oil the said cogs and gears under the direction of the defendant's agent, and that on said date the plaintiff was ordered by defendant's foreman to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence

on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's directions as aforesaid; came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, his breast torn open so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have and did have his said right arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pains in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physician believe to be the result of internal injuries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machine aforementioned, and that work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely on or about July 6, 1910, plaintiff's former boss or head, the engineer aforementioned was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the head engineer aforementioned. Plaintiff's main work was at the motor below this concrete elevator running the cars afore-

mentioned, but plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had according to instructions done said oiling about four or five times and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery, and being a foreigner and unfamiliar with machinery did not realize the dangers accompanying work around unprotected machinery. Plaintiff at the time of said injury was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VII.

All of said injuries were caused by the negligence of the defendant in not having said cogs and gears properly guarded and in allowing the same to be used without guards, and all without the fault of the plaintiff.

VIII.

That within six months after plaintiff received said injuries, to-wit: on the 19th day of October, 1910, and again on the 2nd day of November plaintiff gave a notice in writing of the time, place and cause of his said injuries, which notice was signed by Herbert W. Meyers, his attorney in his behalf; that defendant has made no settlement for said injuries or for any of them, and that one year has not elapsed since the happening of said injuries.

IX.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three ($3.00) Dollars per day, and by reason of this accident he has lost in wages approximately Two Hundred and Sixty-two ($262.00) Dollars.

X.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand ($12.000.00) Dollars.

WHEREFORE: Plaintiff asks for judgment against the defendant for Twelve Thousand Two Hundred and Sixty-two ($12,262) Dollars, together with his costs and disbursements in this action incurred.

HERBERT W. MEYERS,
IVAN BLAIR,
Attorneys for Plaintiff.

State of Washington,
County of King—ss.

Eli Melovich, being first duly sworn to tell the truth, deposes and says as follows: I am the plaintiff in the above entitled cause and I have read the foregoing complaint and know the contents thereof and believe the same to be true.

His
ELI X MELOVICH.
Mark

Witness: E. Bielich.

Subscribed and sworn to before me this 31st day of October, 1910.

HERBERT W. MEYERS,
Notary Public in and for the State of Washington,
residing at Seattle.

Service made Nov. 23, 1910.

Indorsed: Summons and Complaint. Filed U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH, *Plaintiff.* vs. STONE & WEBSTER ENGINEERING CORPORATION, *Defendant.*	No. 1934. APPEARANCE.

To the Clerk of the above Entitled Court:

You will please enter my appearance as attorney for Eli Melovich in the above entitled cause, and service of all subsequent papers, except writs and process, may be made upon said plaintiff, by leaving the same with

HERBERT W. MEYERS,

Office Address: 430-3 Pioneer Bldg., Seattle, Washington.

Indorsed: Appearance. Filed U. S. Circuit Court Western District of Washington, Apr. 26, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

STIPULATION.

It is stipulated and agreed by and between Eli Melovich, plaintiff above named, by his attorneys Herbert V. Meyers and Ivan Blair, and Stone & Webster Engineering Corporation, a corporation, the above named defendant, by its attorneys Kerr & McCord, that the petition for removal in the above entitled cause and that part thereof referring to the residence of the above named plaintiff, may be amended in such a manner as to show that the above named plaintiff is not only a resident and was a resident of the State of Washington at the time of the institution of the above entitled action, but also to show that said plaintiff was at said time a citizen of the State of Washington.

It is further mutually agreed by and between the parties, through their respective counsel that the said amendment may take place at once and without an order of the court to that effect and by interlineation.

HERBERT W. MEYERS,
IVAN L. BLAIR,
Attorneys for Plaintiff.
KERR & McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed U. S. Circuit Court, Western District of Washington, May 1, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. 1934. SUMMONS.

The State of Washington to Stone & Webster Engineering Corporation, a corporation, the above named defendant:

You are hereby summoned and required to appear within twenty (20) days after the service of this summons upon you, exclusive of the day of service, and defend the above entitled cause in the Circuit Court of the United States for the Western District of Washington, Northern Division, and answer the complaint of the plaintiff and serve a copy of your answer upon the undersigned attorney for plaintiff at his office below named, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which will be filed with the Clerk of said Court, a copy of which is herewith served upon you.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Postoffice Address: 430-433 Pioneer Bldg., Seattle, Wash.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

AMENDED COMPLAINT.

Plaintiff complains of defendant and alleges:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, maintaining an office in the City of Seattle, State of Washington, with one M. J. Whitson as its resident and statutory agent, and as such may sue and be sued in the Courts of the State of Washington.

II.

That the defendant on the 12th day of July, 1910, and prior thereto, operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: a concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small buildings, and a large building or structure some sixty (60) feet in height wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery, which said establishment was used by the defendant in the production and manufacture of a mercantile substance or commodity known as concrete.

That the buildings were all of a permanent nature and a part of the concrete manufacturing plant maintained by de-

fendant company in manufacturing concrete for the Snoqualmie Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and on which cogs and gears the employees of the defendant were liable to come in contact, while in the performance of their duty as such employees, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employees therefrom.

IV.

That the defendant, on or about the said date and prior thereto, failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected.

V.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in and about said factory or mill, and that on said date plaintiff was ordered by the foreman or superintendent acting for the defendant corporation to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's directions as aforesaid; he came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, his breast torn open so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have and did have his said right

arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of his said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pain in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physician believe to be the result of internal injuries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machine aforementioned; that this work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely on or about July 6, 1910, plaintiff's former boss or head, the engineer aforementioned, was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the head engineer aforementioned.

Plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had, according to instructions, done said oiling about four or five times and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery.

Plaintiff, at the time of said injury, was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VI.

That the aforesaid injuries to the plaintiff were not due to any carelessness, fault or negligence of his own, but were due to and occasioned by the indifference, carelessness and gross negligence of the defendant. That the carelessness and negligence aforesaid consisted in failing to provide and maintain reasonable safeguards for the aforesaid cogs, shafts and gearing, as is required by the laws of the State of Washington, Section 6587, Rem. & Ball. An. Code, State of Washington.

VII.

That within six months after plaintiff received said injuries, to-wit, on the 19th day of October, 1910, and again on the 2nd day of November, plaintiff gave a notice in writing of the time, place and cause of his said injuries to the defendant corporation through W. J. Whitson, its resident and statutory agent, which notice was signed by Herbert W. Meyers, attorney in his behalf; that defendant has made no settlement for said injuries or for any of them, and that one year has not elapsed since the happening of said injuries.

VIII.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three Dollars ($3.00) per day and by reason of this accident he has lost in wages approximately Two Hundred Sixty-two Dollars ($262.00):

IX.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand Dollars ($12,000.00).

WHEREFORE, plaintiff asks for judgment against the defendant for Twelve Thousand Two Hundred Sixty-two Dollars ($12,262.00), together with his costs and disbursements in this action incurred.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

ELI MELOVICH, being first duly sworn, on oath deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

His
ELI X MELOVICH,
Mark

Witness: E. Bielich.

Subscribed and sworn to before me this 1st day of May, 1911.

HERBERT W. MEYERS,
Notary Public in and for the State of Washington, residing at Seattle.

Copy of the within Summons and Complaint received and due service of same acknowledged this 1st day of May, A. D. 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Summons and Amended Complaint. Filed U. S. Circuit Court, Western District of Washington, May 2, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. 1934. ANSWER.

Comes now the defendant Stone & Webster Engineering Corporation and for answer to the amended complaint herein alleges and shows the court.

I.

Answering paragraph two of the amended complaint, this defendant denies said paragraph and each and every allegation therein contained, save and except that the defendant admits that on July 12th, 1910, it was engaged in the erection of a building for a power plant as hereinafter set forth.

II.

Answering paragraph three of said amended complaint, this defendant denies said paragraph and each and every allegation therein contained, save and except that the defendant admits at the time therein referred to it was operating a bucket elevator for the hoisting and handling of certain gravel used in mixing concrete for the construction of a building to be used as a power house.

III.

Answering paragraph four of said amended complaint, this defendant denies said paragraph and each and every allegation therein contained.

IV.

Answering paragraph five of said amended complaint, this defendant admits that on or about the 12th day of July, 1910,

while in its employ, the plaintiff was injured by allowing his right arm to come in contact with certain cog wheels, being a part of the machinery of the gravel elevator, which the plaintiff was then and had been for about three weeks engaged in operating; denies each and every other and remaining allegation in said paragraph five contained and each and every part thereof.

V.

Answering paragraph six of plaintiff's amended complaint, this defendant denies said paragraph and each and every allegation therein contained.

VI.

Answering paragraph seven of the amended complaint, this defendant admits that on or about October 14th, 1910, the plaintiff through his attorney served upon this answering defendant, a purported notice in writing under the Factory Act.

VII.

Answering paragraphs eight and nine of the amended complaint, this defendant denies said paragraphs and each and every allegation therein contained.

Further answering said amended complaint and by way of first affirmative defense thereto this defendant alleges and shows the court:

That on to-wit, July 12th, 1910, this defendant was engaged in the construction of a concrete building situated on the northeasterly side of Snoqualmie River and immediately below Snoqualmie Falls; that situated in a northeasterly direction from said building and about nine hundred feet distant therefrom was a gravel pit, and located about twenty-five feet above the gravel pit was a tramway to which the said gravel was elevated and down the slope of which it was carried by water, which washed the dirt out of the gravel and said gravel was deposited in bunkers from which it was removed to a concrete mixer at the place said concrete power house was being constructed; that at the top of said tramway and immediately above said gravel pit was situated a lift or elevator and that the gravel

was elevated from a point about twenty-five feet below said lift and by bucket running on an endless chain; that this endless chain was operated by said elevator in the construction of which a set of cogs were used; that this elevator was operated by electric power and that for a period of about three weeks prior to the happening of the accident to the plaintiff, he was the motorman employed for the purpose of and engaged in the operating of said elevator, and it was his duty as motorman, not only to operate said elevator, but to keep the shafting, bearings and parts thereof oiled and in running order; that the cog wheels used in said elevator were in plain and open view and that the danger of injury to the plaintiff should he allow the sleeve of his jumper to be caught therein was open, apparent and manifest and well known to the plaintiff; that the plaintiff had entire control of said elevator and that it was not necessary for him to have oiled the shafting about where the cogs were located while said elevator was in operation; that if any danger there was in the oiling of the shafting about the cogs, the plaintiff could have stopped said elevator and oiled any of the bearings without any danger to him whatsoever. That said elevator was an isolated piece of machinery, not connected in any manner with any operating factory or manufacturing plant, but was used as aforesaid solely and exclusively for the purpose of elevating the gravel for the purpose of washing the same and allowing the same to descend along the decline of said tramway for use in the making of concrete for the construction of said power house building. That the manner and method of operating said elevator and the condition thereof and the risk and danger, if any such risk and danger there were incident to the operation of the same, were naturally incident thereto and were all open, apparent and fully understood and appreciated by the plaintiff and were assumed by him as a part of his employment.

For a further, separate and second affirmative defense to the matters and things alleged in the amended complaint, the defendant repeats the allegations contained in the first affirmative defense and further alleges that if any injury or damage was sustained by the plaintiff at the time of his alleged injury set forth in his complaint and in his amended complaint, the

same was caused and contributed to solely by the careless and negligent acts and conduct of the plaintiff himself, and was not caused or contributed to by any careless or negligent acts or conduct on the part of this answering defendant, its agents or employees whatsoever.

WHEREFORE having fully answered, this defendant prays to be dismissed hence with his costs and disbursements herein expended.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King—ss.

J. R. Lotz, being first duly sworn, on oath deposes and says: That he is agent of the defendant above named; that he has read the foregoing answer to the amended complaint herein and knows the contents thereof and believes the same to be true.

J. R. LOTZ.

Subscribd and sworn to before me this 2d day of May, A. D. 1911.
(Seal)

J. N. IVEY,
Notary Public in and for the State of Washington, residing at Seattle.

Verification O. K.

HERBERT W. MEYERS,
Attorney for Plaintiff.

May 2, 1911.

Copy of within Answer received and due service of same acknowledged this 2d day of May, 1911.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, May 2, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

REPLY.

Comes now plaintiff in the above entitled action and for reply to the affirmative matter set out in the Answer of Defendant herein served, says:

I.

That he denies each and every, all and singular, the allegations contained in paragraphs I, II and III of said Answer.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Copy of within Reply received and due service of same acknowledged this 2d day of May, A. D. 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, May 2, 1911. Sam'l D. Bridges, Clerk. R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

ORDER.

This matter coming on for hearing on the motion of defendant to strike and make more definite,

IT IS ORDERED that plaintiff have leave to file an amended complaint in which will be embodied the points which have been settled by agreement between counsel as to the first six paragraphs of defendant's motion. Paragraph VII of defendant's motion is denied.

DONE in open Court this 1st day of May, A. D. 1911.

GEORGE DONWORTH, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, May 1, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

REPLY.

Comes now plaintiff in the above entitled action and for reply to the affirmative matter set out in the Answer of Defendant herein served, says:

I.

That he denies each and every, all and singular, the allegations contained in paragraphs I and II of said Answer.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

Eli Melovich, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

His
ELI X MELOVICH,
Mark

Eli Bielich.

Subscribed and sworn to before me this 3d day of May, 1911.

(Seal) HERBERT W. MEYERS,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, May 5, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff.* vs. STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	No. 1934. NOTICE TO PRODUCE WRITTEN INSTRUMENT.

To the above named Defendant and Kerr & McCord, Its Attorneys:

You are hereby notified and requested to produce at the trial of the within named action, that certain written letter or notice dated October 14, 1910, signed by the undersigned attorney for plaintiff, addressed to the above named defendant and received by it on the date aforesaid, which said writing gives notice of the time, place and cause of injury to plaintiff as required by the "Factory Act."

Dated September 20, 1911.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Due service acknowledged this 21st day of September, 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Notice to Produce Written Instrument. Filed U. S. Circuit Court, Western District of Washington, Sep. 25, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH, *Plaintiff.*	
vs.	No. 1934.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*	PRAECIPE.

To the Clerk of the above Entitled Court:

You will please cause subpoenas to be issued in the above entitled cause for the following witnesses: Sam Marcovich, c/o Stone & Webster, Snoqualmie, Wash., William Savage, 2822 West 73d St., Seattle, Wash., Eugene John Doe Langdon.

HERBERT W. MEYERS,
Atty. for Deft.

Indorsed: Praecipe for Process, etc. Filed U. S. Circuit Court, Western District of Washington, Sep. 25, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.

No. 1934.

ORDER APPOINTING INTERPRETER.

Now on this day upon motion of counsel for plaintiff and for sufficient cause appearing, it is ordered that Mrs. May Zeilich be, and she is hereby appointed and duly sworn to act as interpreter during the trial of this cause.

September 28, 1911.

Page 444 Journal—Circuit Court.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,*

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, *Defendant.*

No. 1934.

PLAINTIFF'S STATEMENT OF THE CASE.

Plaintiff, Eli Melovich, was injured on the 12th day of July, 1910, while working at the plant operated by the defendant corporation near Snoqualmie Falls, King County, Washington, the defendant operating certain concrete mixing machinery and a certain gravel washing machine in the cogs of which the plaintiff had his right arm crushed, necessitating the amputation thereof at a point about two inches from the shoulder, and was confined in the hospital twenty-eight days.

Plaintiff has sued for the loss of his right arm, internal injuries and pains caused by the contact between his chest and said cog wheels. Plaintiff's face was torn open, as was his chest and side. He further claims for pains in his left breast and chest, and asks for $12,262, including $262 for loss in wages.

Plaintiff alleges that defendant failed to furnish him with a safe place in which to work and that defendant operated defective machinery, permitted plaintiff to work around cog wheels unguarded, plaintiff contending that his previous employment had been as a laborer and that he knew nothing of machinery of any kind and had no experience with any sort of machinery, and had never worked around a gravel machine before. That the oiling of the gravel machine on which plaintiff lost his arm was not a part of his duty and that when he was ordered to oil the same he was ordered outside of the scope

of his employment. That the oiling of said gravel machine had been done by plaintiff's former boss and that six or seven days before this accident, the plaintiff's boss was changed and the new boss, Slim Dickey Jackley, did order this plaintiff to oil said machinery. That he had oiled said cogs and wheels only two or three times before he was injured. That the injuries were not due to any carelessness, fault, or negligence on the part of plaintiff, but were due to the indifference, carelessness and gross negligence of defendant corporation.

HERBERT W. MEYERS.

INSTRUCTIONS REQUESTED BY PLAINTIFF

INSTRUCTION NO. 1.

You are instructed that it was the positive duty of the defendant in this case to use ordinary care and prudence in furnishing to the plaintiff before and at the time of the injury complained of, a reasonably safe place and reasonably safe surroundings in which to work, and to use all appliances readily attainable known to science for the prevention of accidents, and that, if you find from the evidence that the cogs, wheels, gearings, etcetera, alleged to have caused the injury complained of did, in fact cause the injury, and that they were not so guarded as to render them reasonably certain to avoid injuring workmen employed upon, around or about them, then, and in that event, the said cogs, wheels, gearings, etcetera, were not properly guarded, the place in which the plaintiff was directed to work was not reasonably safe, the defendant did not perform his duty toward the plaintiff, and that the failure of the defendant to perform his duty to the plaintiff in this respect was culpable negligence upon the part of the defendant, for which he is liable.

Ry. v. Ross, 112 U. S. 337 (28-787)
Gardner v. Ry., 150 U. S. 349 (37-1107)
Ry. v. Herbert, 116 U. S. 642 (29-755)
Mather v. Rillston, 156 U. S. 391 (39-464)

Ry. v. McDade, 191 U. S. 64 (48-96)
Archbald, 170 U. S. 665 (42-1188)
Metzler v. McKenzie, 34 Wash. 470
Trump, 94 S. W. 903 (Tex. Civ. App.)
Hansell v. Clark, 214 Ill. 399 (73 N. E. 787)

INSTRUCTION NO. 2

You are instructed that, where a master confers authority upon one of his employes to take charge of and control over a certain class of workmen in carrying on some particular branch or department of his business, such employe in governing and directing the movements of the men under his charge with respect to that branch or department of the business is the direct representative of the master, and orders or commands given by him to the servant under him, respecting the work of the master are, in law, the orders and commands of the master and if the employe in charge and control for the master be guilty of a negligent or wrongful exercise of his power and authority over the men under his charge, it is, in law, the same as though the master was guilty of negligence.

Brickwood, Sacket Instructions, 1439
R. R. v. Dwyer, 162 Ill. 482 (44 N. E. 815)
Steel Co. v. Hansen, 97 Ill. App. 469 (62 N. E. 918)
R. Co. v. Dixon, 194 U. S. 338 (48 L. Ed. 1006)
R. Co. v. Peterson, 162 U. S. 346 (40 L. Ed. 994)
Baugh, 149 U. S. 368 (37 L. Ed. 772)
Hambly, 154 U. S. 349 (38 L. Ed. 1009)
Keegan, 160 U. S. 259 (40 L. Ed. 418)
Conroy, 175 U. S. 323 (44 L. Ed. 181)

INSTRUCTION NO. 3

The court instructs the jury that, where a person in the employ of another in the performance of a specific line of duty, only ordinarily hazardous, is commanded by another servant, to whom he is so subordinate that he is compelled to obey his directions, to do an act in the same general service, extra hazardous in its nature and outside of the scope of the employ-

ment for which he had been engaged in respect to which the servant giving the order knew or should have known he was unskilled and inexperienced, and in doing the act the servant so directed receives injuries occasioned by the negligence of the employer or of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant so injured, and the jury will so find.

Ry. v. Fort, 17 Wall. 553 (21-739)
Hough v. Ry., 100 U. S. 213 (25-612)
Ry. v. Peterson, 162 U. S. 346 (40-994)
Charles, 162 U. S. 359 (40-999)
Conroy, 175 U. S. 323 (44-181)
Baugh, 149 U. S. 368 (37-772)
Herbert, 116 U. S. 642 (29-775)
Martin v. Ry. 166 U. S. 399 (41-1051)
SS. Co. v. Merchant, 133 U. S. 375 (33-656)
Ry. v. Holmes, 202 U. S. 438 (50-1094)

INSTRUCTION NO. 4.

You are instructed that an employe assumes only the ordinary risks incident to the service for which he is engaged, and that he does not assume the risks of the negligence of the employer; that an employe has the right to presume that the employer has not neglected to perform his duty toward him and has used due care to provide him a reasonably safe place in which to work, has procured and is using all appliances readily attainable known to science for the prevention of accidents and has furnished reasonably safe and suitable machinery, tools and other instrumentalities for his use; that, if you find from the evidence that the plaintiff was injured and that his injury was due to the failure of the defendant to provide a reasonably safe place in which for him to work, together with reasonably safe and suitable machinery, tools and other instrumentalities, guarded by all appliances readily attainable known to science for the prevention of accidents, then, and in

that event, the plaintiff did not assume the risk of injury while so employed.

(1) *Hough v. Ry.* 100 U. S. 213 (25-612)
Ry. v. McDaniel, 107 U. S. 454 (27-605)
Herbert, 116 U. S. 642 (29-755)
Babcock, 154 U. S. 190 (38-958)
McDade, 191 U. S. 64 (48-96)
O'Brien, 161 U. S. 454 (40-766)
(2) *Ry. v. Ross,* 112 U. S. 377 (28-787)
Tuttle v. Ry. 122 U. S. 189 (30-1114)
Ry. v. Archibald, 170 U. S. 665 (42-1188)
Schlemmer v. R. 205 U. S. 1 (51-681)
Kohn v. McNulty, 147 U. S. 238 (37-150)
(3) *Ry. v. Swearenger,* 196 U. S. 51 (49-382)
Archibald (2)
Herbert (1)
Jarvi, 53 Fed. 65
(4) *McDade* (1)
Mather v. Rillston, 156 U. S. 391 (39-464)
(5) *Gardner v. Ry.* 150 U. S. 349 (37-1107)
Ry. v. McDade, 135 U. S. 554 (34-235)
Hough (1)
Patton v. Ry. 179 U. S. 658 (45-361)
O'Brien (1)
McDade (1)
Archibald (2)
Peterson, 162 U. S. 346 (40-994)
Babcock (1)
Ross (2)
(6) *Ross* (2)
Mather v. Rillston (4)
Jarvi (3)

INSTRUCTION NO. 5.

If you believe, from the evidence, that plaintiff has been injured permanently and his earning capacity impaired by reason thereof, and you award him damages therefor, as is your right, you may refer to certain approved mortality tables

showing the life expectancy of persons of various ages, in order to ascertain the probable number of years the plaintiff, at the time of the injury to him, was expected to live, which in the case of this plaintiff is thirty-five and thirty-three hundredths years, and you are authorized to award to him, because of the damage he has suffered from the impairment of his earning capacity, if any, regardless of any other item of damage, such a sum as would, with interest at the rate of six per cent per annum during the period of his life expectancy, at the end of the period of his life expectancy, as shown by the table, equal in amount the full sum he might reasonably be presumed to have lost in earnings and income during his life, as a result of the injury. In determining the amount which he may reasonably be presumed to lose because of the impairment of his earning capacity, consideration may properly be given to the decrease in the earning capacity of the plaintiff during the later years of his life, due to old age, sickness and other possible causes. But consideration should be given also to the probably increase in the earning capacity of the plaintiff by reason of additional experience and increased efficiency in his line of business. While the jury may employ the mortality tables and the suggestions here made by the court in arriving at a verdict, it must be understood that they are not conclusive upon the jury and they may use other means in determining their verdict, but in no event can damages be awarded in excess of the amount named in the complaint.

Dunbar v. Dunbar, 190 U. S. 340 (47 L. Ed. 1084)
R. R. v. Putnam, 118 U. S. 545 (30 L. Ed. 257)
R. R. v. Elliott, 149 U. S. 266 (37 L. Ed. 728)
R. R. v. Putnam, 118 U. S. 545 (30 L. Ed. 257)

INSTRUCTION NO. 6.

If you find from the evidence, that the injuries occurred by reason of any negligence on the part of the company, then the plaintiff is entitled to recover, unless it affirmatively appears by a preponderance of evidence on that point that he was himself guilty of such negligence as to be a proximate cause of the injuries he suffered. In determining the exist-

ence of contributory negligence, you should not hold the plaintiff liable for faults due to the want of capacity or intelligence to realize and appreciate what is and what is not, negligence. You should require him to have exercised only such faculties and capacities as he is endowed with by nature for the avoidance of danger. The question of contributory negligence on the part of the plaintiff is a matter of defense and admits or presupposes negligence on the part of the defendant, and the company must establish the fact of such negligence on the part of the plaintiff by a fair preponderance of evidence. If you find the evidence on the question of contributory negligence is equally balanced, then upon that question you would have to find for the plaintiff. The fact of contributory negligence is never presumed, but must be proved.

Railroad Co. v. Cumberland, 176 U. S. 232 (44 L. Ed. 447)

INSTRUCTION NO. 7.

The court instructs the jury that, if they find for the plaintiff, and award him damages, they will assess compensatory damages only, which means a fair and reasonable compensation for all injuries, past and prospective, bodily and mental, consequent upon the injury (1), consideration being given to the age and condition in life of the plaintiff, his earning capacity and the impairment thereof, his physical and mental suffering and pain already endured and such as he may reasonably be expected to endure in the future as a consequence of the injury (2), the value of the time lost by him (3), the expense shown to have been incurred by him for hospital, surgical and medical treatment and attention (4), the permanent disfigurement of his person, the permanent injury to his health by reason of the injury, the nature of the injury—whether it be permanent or not, and the probable sum total of the earnings lost, or to be lost, by him during the balance of his life because of the impairment of his earning capacity in consequence of the injury and its permanency, if permanent, as well as all other elements of damage which have resulted or

are reasonably certain to result in the future by reason of the injury, if any, you have found he has sustained.

(1) *Pierce v. Ry.*, 173 U. S. 1 (43-591)
Ry. v. Putnam, 118 U. S. 545 (30-257)
Kennon v. Gilmore, 131 U. S. 22 (33-110)
District v. Woodbury, 136 U. S. 450 (34-472)
(2) *McDermott v. Severe*, 202 U. S. 600 (50-1162)
Ry. v. Harmon, 147 U. S. 571 (37-284)
(3) *Beckwith v. Dean*, 98 U. S. 266 (25-124)
Ry. v. Putnam, 118 U. S. 545 (30-287)
(4) *Ry. v. Putnam* (3)
Pierce v. Ry. (1)
Kennon v. Gilmore (1)
Beckwith v. Dean (3)
Wade v. Leroy, 20 How. 34 (15-124)
(5) *Ry. v. Barron*, 5 Wall. 90 (18-591)
(6) *Pierce v. Ry.* (1)
Ry. v. Putnam (1)
Wade v. Leroy (4)
Neb. City v. Campbell, 2 Black. 590 (17-271)

INSTRUCTION NO. 8.

The court instructs the jury that, if they find from the evidence, that the company neglected to perform its duty to its employes in the matter of providing them a reasonably safe place and reasonably safe and suitable machinery, tools and other instrumentalities in and with which to perform their duties, and that such neglect on the part of the company was one of the proximate causes of the injury, suffered by the plaintiff, the fact that the plaintiff received the injury complained of while performing a duty in obedience to an order and command of another employe of the company, who had power and authority to direct and govern the plaintiff, did not relieve the company of liability for injuries sustained through and by reason of such neglect of the company to perform its duty to its employes.

Mining Co. v. Fulton, 205 U. S. 60 (51 L. Ed. 708)
Ry. v. Lyon, 203 U. S. 465 (51 L. Ed. 276)
Ry. v. Cummings, 106 U. S. 700 (27 L. Ed. 266)

INSTRUCTION NO. 9.

This being a civil action, the jury are instructed that the question involved should be determined by the preponderance of the evidence (1), and that by preponderance is not meant the greater number of witnesses testifying for either party, but, instead the relative merit and weight of the evidence, taken as a whole, which is proved by either party (2). You should consider all of the evidence and all of the facts and circumstances proved on the trial, giving to the several parts of the evidence, and to the testimony of the witnesses, such weight as you believe they are entitled to. In arriving at the weight to be given to the testimony of the several witnesses, you should take into consideration whatever interest they have in the suit, if any, their appearance, conduct and demeanor while testifying, their apparent bias in favor of either party and the reason for it, if any, the reasonableness of the testimony given by each, and all of the circumstances which go to corroborate or to contradict witnesses, if any such are proved (3). If, upon consideration of the evidence and all of the facts and circumstances, you should find that the evidence was evenly balanced, then, and in that event, your finding should be for the plaintiff (4).

(1) Greenl. Ev. S. 29 (14th Ed.)
Lilenthal v. U. S. 97 U. S. 237 (24-901)

(2) *Brown v. People*, 65 Ill. App. 58

(3) *Evans v. Lipscomb*, 31 Ga. 71
French v. Millard, 2 Ohio St. 44
Sellar v. Clelland, 2 Colo. 539
Richardson v. Boynton, 38 Neb. 288 (56 N. W. 886)
Dodge v. Reynolds, 135 Mich. 692 (98 N. W. 737)

(4) 2 *Whart.* Ev. S. 1245
Gordon v. Parmelee, 15 Gray 415
Lilienthal v. U. S. (1)

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a Corporation,
Defendant.
No. 1934.

PLAINTIFF REQUESTS THAT THE FOLLOWING INSTRUCTIONS BE GIVEN TO THE JURY.

HERBERT W. MEYERS.

INSTRUCTION NO. —.

If you find from the evidence, that the injuries occurred by reason of negligence on the part of the corporation as set forth in the complaint, then the plaintiff is entitled to recover, unless it affirmatively appears by a preponderance of the evidence on that point that he himself was guilty of such negligence as to be a contributing cause of the injuries he suffered. In determining the existence of contributory negligence, you should not hold the plaintiff liable for faults due to the want of capacity or intelligence to realize and appreciate what is and what is not dangerous. You should require him to have exercised only such faculties and capacities as he is endowed with by nature for the avoidance of danger. The question of contributory negligence on the part of the plaintiff is a matter of defense and admits or presupposes negligence on the part of the defendant corporation and the defendant corporation must establish the fact of such negligence on the part of the plaintiff by a fair preponderance of the evidence. If you find the evidence on the question of contributory negligence is equally balanced, then upon that question you would have to find for

the plaintiff Melovich. The fact of contributory negligence is never presumed, but must be proved.

Railroad Co. v. Cumberland, 176 U. S. 232 (44 L. Ed. 447)

INSTRUCTION NO. —.

It is the duty of an employer operating machinery or other dangerous agencies and employing others to assist him to exercise the same degree of care for the safety of his workmen and employes that an intelligent person of ordinary prudence and caution does habitually exercise for his own safety, and the failure of an employer to exercise such care to provide a reasonably safe place and surroundings for his employes to work in is a neglect of duty constituting a legal wrong, and when an employe suffers injury in consequence of the failure of the employer to provide such reasonably safe place and surroundings, the employer is liable to such employe in damages on the principle that he should render compensation in consequence of his wrongful act. The word "reasonable" when used in this connection is a qualifying term that has to be applied, and it devolves on the jury to exercise their reasoning faculties to determine what was reasonable in the particular instance.

INSTRUCTION NO. —.

I instruct you that it is the duty of a master to furnish a reasonably safe place for his servants to work (1), and to provide reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done (2), and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty (3). If instead of personally performing these duties the master engages another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do that which it is the duty of the master to perform as such (4). The employe has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others,

that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. The liability does not depend upon the grade of service of a co-employe, but upon the character of the act itself, and a breach of the positive obligation of the master (5).

(1) *R. R. v. Holmes*, 202 U. S. 438 (50-1094)
Hough v. R. R. Co. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)
R. R. v. Baugh, 149 U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
(2) *R. R. v. Baugh*, 149 U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
Hough v. R. R. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)
(3) *R. R. v. Baugh*, 149, U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
Hough v. R. R. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)
(4) *R. R. v. Peterson*, 162 U. S. 346 (40-994)
R. R. v. Charles, 162 U. S. 359 (40-999)
R. R. v. Conroy, 175 U. S. 323 (44-181)
R. R. v. Baugh, 149 U. S. 368 (37-772)
Hough v. R. R. 100 U. S. 213 (25-612)
Gardner v. R. R. 150 U. S. 349 (37-1107)
R. R. v. Daniels, 152 U. S. 684 (38-597)
(5) *R. R. v. Daniels*, 152 U. S. 684 (38-597)
R. R. v. Baugh, 149 U. S. 368 (37-772)
R. R. v. Conroy, 175 U. S. 323 (44-181)
Hough v. R. R. 100 U. S. 213 (25-612)
R. R. v. Herbert, 116 U. S. 642 (29-755)

INSTRUCTION NO. —.

An employe does not assume the risks of the employer's negligence (1), and has a right to presume that the employer has not neglected to perform his duty toward him in the matter of using reasonable care to provide him a reasonably safe place in which to work and in using the necessary approved

appliances for the prevention of accidents and has furnished reasonably safe and suitable machinery, tools and other instrumentalities for his use (2). If you find from the evidence in this case that the plaintiff was injured and that his injury was in consequence of the failure of the defendant corporation to provide such reasonably safe place in which for him to work, and reasonably safe and suitable machinery, tools and other instrumentalities so safeguarded as to be reasonably certain to prevent accidents, then, and in that event, the plaintiff did not assume the risk of injury while so employed.

Only the dangers obvious to a man of his intelligence and dangers of which he has actual knowledge, incident to his employment, are assumed by the employe. The employe is not required by the law to assume the risk of dangers which he does not know of—he is not required to search for dangers, but he is required to observe dangers ordinarily open to observation when exercising the degree of vigilance that a person of his natural capacity, his degree of intelligence, his experience with machinery would exercise, and he is chargeable only with the assumption of risk of those dangers that would necessarily be apparent to a man of his intelligence and capacity.

(1) *R. R. v. O'Brien*, 161 U. S. 451 (40-766)
R. R. v. McDade, 191 U. S. 64 (48-96)
(2) *R. R. v. Swearingen*, 196 U. S. 51 (49-382)
R. R. v. Archbold, 170 U. S. 665 (42-1188)
R. R. v. McDade, 191 U. S. 64 (48-96)

INSTRUCTION NO. —.

The plaintiff has set forth in his complaint an allegation that the place in which he was working at the time of the injury to him was not a safe place, and, being a question of fact, it is for the jury to determine from the evidence whether or not the place where the plaintiff was working when injured was a reasonably safe place for the performance of the work to be done there—a reasonably safe place considering the character of the premises. If you find that it was not reasonably safe, and the negligence of the defendant corporation in not making it reasonably safe contributed to the happening of the

accident, then the defendant corporation is liable, provided the plaintiff himself was not guilty of negligence which contributed to the accident.

Ry. Co. v. Lyon, 203 U. S. 465 (51-276)

INSTRUCTION NO. —.

You should consider all of the evidence and all of the facts and circumstances proved on the trial, giving to the several parts of the evidence, and to the testimony of the witnesses, such weight as you believe they are entitled to. In arriving at the weight to be given to the testimony of the several witnesses, you should take into consideration whatever interest they have in the suit, if any, their appearance, conduct and demeanor while testifying, their apparent bias in favor of either party and the reason for it, if any, the reasonableness of the testimony given by each, and all of the circumstances which go to corroborate or to contradict witnesses, if any such are proved. If, upon consideration of the evidence and all of the facts and circumstances, you should find that the evidence was evenly balanced, then, and in that event, your finding should be for the plaintiff.

INSTRUCTION NO. —.

You are the sole and exclusive judges of the evidence in this cause, of the credibility of the several witnesses, and of the degree of weight to be attached to the testimony of such witnesses. In considering the testimony of any witness, you may consider the apparent fairness and candor or lack thereof of such witness, his apparent bias or lack thereof, the interest or lack of interest, if any, which you may believe such witness has or feels in the result of your verdict, the reasonableness or unreasonableness of the story which witness relates, the opportunities for knowing the facts whereof such witness testifies, and give to such testimony of any witness such weight as in your judgment it may be entitled to. You must be slow to believe any witness has testified falsely, but if you are satisfied that any witness has testified falsely to any material matter, you are then at liberty to disregard the testimony of such

witness entirely, except in so far as the same may be corroborated by other credible evidence in the case.

INSTRUCTION NO. —.

The Court instructs the jury that, if they find for the plaintiff, and award him damages, they will assess compensatory damages which means a fair and reasonable compensation for all injuries, past and prospective, bodily and mental, consequent upon the injury (1), consideration being given to the age and condition in life of the plaintiff, his earning capacity and the impairment thereof, his physical and mental suffering, his mental anguish when contemplating his permanently crippled condition, if you find him so crippled, the pain already endured and such as he may reasonably be expected to endure in the future as a consequence of the injury (2), the value of the time lost by him (3), the expense shown to have been incurred by him for hospital, surgical and medical treatment and attendance (4), the permanent disfigurement of his person, the permanent injury to his health by reason of the injury (5), the nature of the injury—whether it be permanent or not, and the probable sum total of the earnings lost, or to be lost, by him during the balance of his life because of the impairment of his earning capacity in consequence of the injury and its permanency, if permanent (6).

(1) *Pierce v. Ry.* 173 U. S. 1 (43-591)
Ry. v. Putnam, 118 U. S. 545 (30-257)
Kennon v. Gilmore, 131 U. S. 22 (33-110)
District v. Woodbury, 136 U. S. 450 (34-472)
(2) *McDermott v. Severe*, 202 U. S. 600 (50-1162)
Ry. v. Harmon, 147 U. S. 571 (37-284)
(3) *Beckwith v. Dean*, 98 U. S. 266 (25-124)
Ry. v. Putnam, 118 U. S. 545 (30-287)
(4) *Ry. v. Putnam* (3)
Pierce v. Ry. (1)
Kennon v. Gilmore (1)
Beckwith v. Dean (3)
Wade v. Leroy, 20 How. 34 (15-124)
(5) *Ry. v. Barron*, 5 Wall. 90 (18-591)

(6) *Pierce v. Ry.* (1)
Ry. v. Putnam (1)
Wade v. Leroy (4)
Neb. City v. Campbell, 2 Black, 590 (17-271)

INSTRUCTION NO. —.

The Court will take judicial notice of the mortuary tables and the fact that plaintiff Melovich had a life expectancy of 35.33 years at the time he was injured, and as the uncontradicted testimony shows that at the time of his injury, he was making $3.00 a day, if you find for the plaintiff Melovich, you are entitled to award him such sum in keeping with the other instructions which I have given you, as he would have made during the period of his expectancy of 35 and a fraction years, had he not been injured, minus such sum as you, in your judgment from the testimony you have heard, believe that he should make during his said expectancy, not to exceed in all the sum of the plaintiff's claim of $12,262.

INSTRUCTION NO. —.

I charge you that if the servant is injured in a moment of forgetfulness, while in the discharge of his duties, and owing to the haste required to perform such duties, he momentarily forgets such danger and in such moment of forgetfulness is injured, that does not in law preclude recovery. That is, the minute that fact appears, it is not proper for law to say, you cannot recover because you knew of the danger and you forgot it. That is a fact and circumstances which you may take into consideration with all the other facts and circumstances in determining the character of the danger and determining the question whether or not the servant was guilty of negligence.

Passage v. Stimson Mill Co., 10 Wash. Dec. 492, 101. p. 239

King v. Griffiths-Sprague, etc., 45 Was. 425, 88 Pac. 759

Hoff v. Jap-Am. Fet. & Fish Co., 48 Wash. 581, 94 Pac. 109

Hall v. West & Slade Mill Co., 39 Wash. 447.

Bush v. Ind. Mill Co., 12 Wash. Dec. p. 1, 103 P. 45

INSTRUCTIONS REQUESTED BY PLAINTIFF

INSTRUCTION NO. —.

Certain evidence has been introduced in the course of this trial from which the jury might readily infer that guards were placed about the cog wheels which are alleged to have caused the injury, soon after the accident occurred. In his complaint, the plaintiff Melovich, alleges that the cog wheels in question were operated without guards about them, and the defendant corporation admits that the cog wheels were not guarded at the time of the accident. I instruct you that the fact that the defendant placed guards about the cog wheels after the accident occurred is not of itself to be taken as indicating negligence on the part of the defendant corporation in not guarding the cog wheels prior to the accident, and you should eliminate the fact of the placing of guards about the cog wheels after the accident, and consider the matter in the light of the admitted condition of the machine at the time of the accident, arriving at your conclusion with respect to the defendant corporation's negligence in not guarding the cog wheels, as alleged in the complaint in this case, or its want of negligence, by consideration of all other evidence introduced during the trial.

Plaintiff requests.

HERBERT W. MEYERS,
Atty. for Pltf.

In the United States Circuit Court for the District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

INSTRUCTIONS REQUESTED BY DEFENDANT.

The defendant respectfully requests the Court to instruct the jury as follows:

INSTRUCTION NO. 1.

The plaintiff is thirty years of age, and testified in this case that he had oiled the washing machine on two or three occasions prior to the time he was oiling it when he was injured. He also testified that the cog wheels by which he was caught were in plain view; that he had oiled them when the washer was being operated, and that he knew that he would be injured if his hands came in contact with them. Under these circumstances I instruct you that no warning or caution could have increased his knowledge of the danger or necessity for care. With the knowledge the plaintiff has admitted he possessed, I instruct you that he assumed the risk of the injury he received, and that he cannot recover.

Bier v. Hosford, 35 Wash. 544.
Greef v. Brown, 51 Pac. 926.
Leubke v. Machine Works, 60 N. W. 711.
French v. R. R., 24 Wash. 83.

II.

A person working with a defective or unguarded machine, without complaint, knowing of the dangers of the defect or unguarded part, if injured thereby, cannot recover:

Crooker v. Pacific Co., 34 Wn. 191.

III.

While it is a rule of law that the employer must furnish the employe with a safe place to work, it is just as well established that the employe assumes the risks of apparent peril. Where the danger is obvious and the servant is ordered by the master to work in a given place, it is the duty of the servant to disobey orders of that nature, and if he does not do so, but voluntarily exposes himself to such danger and is injured he cannot recover:

Bier v. Hosford, 35 Wn. 552-3.

IV.

"A person employed to work about dangerous machinery assumes the risk of all dangers which are obvious, and cannot recover for injuries sustained, although the master failed to instruct the servant regarding his duties connected with the operation of such machinery, and the dangers of his employment in that behalf; the washer which plaintiff in this case was oiling when injured "was dangerous only because there was danger in oiling it, and if it was in fact dangerous it is immaterial that the danger might have been averted by appliances protecting it. If the plaintiff undertook the work knowing the danger, the defendants are not liable, although they might have protected the danger by guarding against it:"

Oleson v. Lumber Co., 9 Wn. 502; 35 Wn. 555.
Gilbert v. Guild, 144 Mass. 601.

V.

The plaintiff testified that he undertook on some occasions to oil the washing machine prior to his injury; that he knew of the existence of the cog wheels and had oiled them when in motion; that if caught in them he would be injured. He does not claim that he made any complaint. I instruct you that when he assumed the work of oiling this machinery he at the same time assumed the risk of injury on the cog wheels:

Oleson v. Lumber Co., 9 Wn. 502.

VI.

You are instructed that it is the duty of employes to use their senses, and when a workman knows or on the reasonable exercise of his faculties should know the dangers which surround him, he must be held to have assumed the risk:

McDonald v. Ry., 31 Wn. 585.

VII.

I instruct you that as a matter of law an employe assumes the risk from defective appliances furnished by his employer when the defect is known to him or plainly observable by him:

R. R. v. McDade, 191 U. S. 64.
R. R. v. Halloway, 191 U. S. 338.
R. R. v. Swearingen, 196 U. S. 62.

If you find that the plaintiff knew the cogs were not guarded, and knew or in the exercise of his senses ought to have known that he would be injured if his clothing should be caught on them, and with this knowledge undertook to oil the washer, he assumed the risk and cannot recover.

R. R. Co. v. McDade, 135 U. S. 554, citing 152 U. S. 153, etc.

VIII.

The employe is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employe or it is so patent as to be readily observed by him he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incidental to such situation. In other words, if he knows the defect, or it is so plainly observable that he may be *presumed* to know of it, and continues in the master's employ without objection, he is taken to have made his election, notwithstanding the defect, and in such case cannot recover:

Co. v. McDade, 24 Sup. Ct. Rep. 24.

IX.

If you find from the evidence in this case that plaintiff knew of the existence of the cog wheels on defendant's gravel washing machine at the time he undertook to oil the machinery, and if you further find that by the exercise of due care the plaintiff could have oiled the bearings of said washer without coming in contact with the cog wheels, and that he failed and neglected to use due care in the performance of that duty, and that he negligently reached over the face of the cog, thereby permitting the sleeve of his jumper to come in contact therewith, by reason of which he sustained injury, I instruct you that he was guilty of such contributory negligence that he cannot recover.

X.

The plaintiff Melovich admitted in his cross-examination that he knew the cog wheels in which he alleges that he was caught were uncovered; that if his hands were permitted to come in contact with them while in motion he would be injured; he is not complaining that the danger therefrom was hidden and that he was not warned of it by defendant.

The law is that a servant who enters or continues in the employment of his master in the presence of visible or obvious defects, and plain or apparent dangers from them which he knows or appreciates, or which an employe of his intelligence and capacity would by the exercise of ordinary care and prudence know and appreciate, assumes the risks of these dangers and cannot be heard to say that he did not appreciate them, and when the uncontradicted evidence establishes these facts, no case arises in his favor. You are accordingly instructed that if you find that plaintiff knew the danger of coming in contact with the cog wheels, or by the exercise of ordinary care and prudence ought to have known it, he cannot recover.

126 F. 511.

XI.

I instruct you that the defendant is not guilty of negligence in not guarding the cog wheels in which plaintiff alleges he was caught.

XII.

The plaintiff in this case is a grown man, and while he claims he had not worked for any length of time about machinery, I instruct you as a matter of law that he is charged with knowledge that the unguarded cogs were dangerous should he allow himself to come in contact therewith.

Plaintiff has charged two grounds of negligence—first, that the defendant failed to furnish the plaintiff a safe place in which to work .Second—that the defendant failed to guard the cog wheels of the machine upon which the plaintiff was injured.

As to the second ground of negligence charged in the complaint, I instruct you that the failure to furnish a guard to the cog wheels in question does not raise a presumption of negligence on the part of the defendant and is not negligence. If the place furnished by the defendant for the plaintiff to work in was reasonably safe without a guard, there was no duty on the part of the defendant to provide or furnish such guard, and the absence and such guard over the cog wheels can only be considered by you as bearing on the question of the safety of the place in which plaintiff was working when injured.

The complaint in this action was drafted in part upon the theory that the defendant was required by the statutes of this State to supply a guard over the cog wheels in question. There is a law in this State which requires the owners of factories, mills, etc., to guard all dangerous machinery that can be practicably guarded with due regard to the successful operation of the machinery—but the scope of such law is limited to factories, mills and manufacturing plants and has no application to this case, and you will disregard all allegations of the complaint and all evidence that has been introduced from which you might infer that it was the duty of the defendant to guard the cog wheels in question. The law requiring machinery in factories to be guarded has nothing to do with this case. The plaintiff has expressly stated that he was not proceeding upon that theory.

If you find from the evidence in this case that the plaintiff is a man of ordinary intelligence; that he possesses the ordinary

faculties of an adult who has a sound mind and body; that his eyesight was uninjured, and that he could see and observe the revolving cog wheels, and that he knew, or might have known that he would be injured if he came in contact with the cogs—that he understood and appreciated the danger of being brought in contact with the revolving cog wheels, then I instruct you that the plaintiff cannot recover in this action and your verdict must be for the defendant, even though you should reach the conclusion from your deliberations that the defendant was negligent in not furnishing the plaintiff a safe place in which to work. Even the risk of negligent acts of the defendant were assumed by the plaintiff if he understood and appreciated the dangers that might result to him from such negligent acts of the defendant, if you find there were any such negligent acts.

If you find from the evidence that the plaintiff in this case was a man of fair average intelligence, in possession of an unimpaired eyesight, and that the cog wheels upon which he was injured were visible to him, or that by the use of his eyesight he could have seen the cog wheels, then I instruct you that you have a right to presume that the plaintiff must have known and observed the danger to him if he permitted his clothing to come in contact with the revolving cog wheels and your verdict must be for the defendant.

"The employer performs his duty when he furnishes appliances and machinery of ordinary character and reasonable safety, and the former is a test of the latter, for in regard to the style of the machinery or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits and ordinary risks of the business. No man is held by law to a higher degree of skill.

"The employer performs his duty when he furnishes appliances and machinery of ordinary character and reasonable safety, and the former is the test of the latter—for in regard to the style of the machinery or nature of the mode of performance of any work 'reasonably safe' means safe according to the usages, habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers.

They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of a community."

1 Labatt, Sec. 44.

And if you find from the evidence in this case that it was not customary at the time of this injury for guards to be placed over cog wheels situated similarly to those on the machine where this injury occurred, then I instruct you that you are not to infer that the defendant was guilty of any negligence in failing to provide a guard for the cog wheels in question; and you will not infer that the defendant was guilty of any negligence from any evidence that may have been introduced tending to show that some safer means of operating the machine could have been adopted, or that a guard might have been placed over the cog wheels. If the cog wheels on the machine in question were operated by the defendant in the usual way in which similar machines are operated in this community, then I instruct you that the plaintiff cannot recover and your verdict must be for the defendant.

"To leave gearings, cogs and other parts of machinery unboxed is not negligence where other manufacturers or operators in the same line of business operate their machinery in the same manner."

1 Labatt, Sec. 77.

Indorsed: Instructions Requested by Defendant.

In the Circuit Court of the United States for the Western District of Washington.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CO.,
Defendant.

No. 1934

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at twelve thousand two hundred and sixty-two dollars ($12,262.00).

L. T. DODGE, Foreman.

Indorsed: Verdict. Filed U. S. Circuit Court, Western District of Washington, Sept. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

To the Stone & Webster Engineering Corporation, and to Kerr & McCord, their Attorneys:

You and each of you will please take notice that the plaintiff, by his attorney, Herbert W. Meyers, will on Tuesday morning, October 3rd, at 10 a. m., ask the Clerk of the United States Circuit Court to tax his costs in the above entitled cause in accordance with the cost bill attached hereto.

HERBERT W. MEYERS,
Attorney for Plaintiff.
M.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

MEMORANDUM OF COSTS AND DISBURSEMENTS.

DISBURSEMENTS.

Clerk's fees to be taxed	$ 13.10	$ 13.10
Service fees		
Serving subpoena on Mele Melovich, Snoqualmie Falls, Wn.	6.80	6.80
Serving Subpoena on William Savage, Seattle, Wash.	2.12	2.12
Serving subpoena on Sam Marcovich, Seattle, Wash.	2.12	2.12
Attorney's fees	20.00	20.00
Reporter's fees	10.00	10.00
Witness fees—		
Mele Melovich, 3 days	9.00	9.00
Mele Melovich, mileage, 136 miles, Snoqualmie Falls to Seattle	6.80	6.80
William Savage, 3 days	9.00	9.00
Sam Marcovich, 3 days	9.00	9.00
Sam Marcovich, mileage, 136 miles, Snoqualmie Falls to Seattle	6.80	6.80
Mrs. Eli Bielich, interpreter	9.00	9.00
	$103.74	$103.74

United States of America,
Western District of Washington—ss.

Herbert W. Meyers, being duly sworn, deposes and says: That he is the attorney for the plaintiff in the above entitled cause, and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause, and that the services charged herein have been actually and necessarily performed as herein stated.

HERBERT W. MEYERS.

Subscribed and sworn to before me this 2nd day of October, 1911.

(Seal) JAMES E. McGREW,
Notary Public in and for the State of Washington, residing at Seattle.

Taxed Oct. 5, 1911.

B. O. WRIGHT, Deputy Clerk.

Service acknowledged this 2d day of October, 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Memorandum of Costs and Disbursements. Filed U. S. Circuit Court, Western District of Washington, Oct. 3, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER and STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendants.

No. 1934.

Order.

This cause coming on to be heard on the application of Kerr & McCord, attorneys for defendants, for an extension of time within which to file in this Court defendants' proposed bill of exceptions, and it being made to appear to the Court that it is impossible for the defendants to procure a transcript of the testimony taken at the trial of cause within the period of ten (10) days from the date of said trial and rendition of the verdict therein, which is necessary to enable the defendants to prepare their bill of exceptions;

IT IS NOW BY THE COURT ORDERED that the time for filing the bill of exceptions herein be extended and defendants are hereby granted until October 20, 1911, within which to prepare, serve and file their proposed bill of exceptions.

DONE in open Court this 4th day of October, A. D. 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Oct. 4, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Judgment.

BE IT REMEMBERED that this cause came duly on for trial on the 27th day of September, 1911, and the same was continued until September 28th, and said trial proceeded until and including the 29th day of September, 1911.

Plaintiff appeared in person and by Herbert W. Meyers, his attorney, and defendant appeared by Kerr & McCord, its attorneys; thereupon a jury of twelve good and lawful men of the district was empaneled and sworn, and the plaintiff introduced his testimony and rested, and defendant introduced its testimony and rested; the cause was argued to the jury by counsel upon either side and the jury was charged upon the law of the case by the Court, and thereupon retired in charge of a sworn bailiff, to consider its verdict, and said jury, after duly considering the same, did on the 29th day of September, 1911, return its verdict wherein and whereby it did find in favor of plaintiff and against the defendant, and assessed plaintiff's damage in the sum of $12,262.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover from defendant, judgment in the sum of $12,262 and for his costs and disbursements hereinafter to be taxed, for all of which let execution issue.

DONE IN OPEN COURT this 4th day of October, 1911.

C. H. HANFORD, Judge.

O. K. as to form.

KERR & McCORD.

Indorsed: Judgment. Filed U. S. Circuit Court, Western District of Washington, Oct. 4, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Complainant,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

MOTION TO SET ASIDE JUDGMENT.

Comes now the defendant, by its attorneys, Kerr & McCord, and moves the Court to set aside the judgment heretofore entered in this cause on the verdict of the jury, and for judgment against the plaintiff notwithstanding the verdict, upon the grounds following:

1. That upon the undisputed testimony in said cause the plaintiff assumed the risk of the injury of which he complained, and cannot recover.

2. Upon the undisputed testimony admitted in said cause, the plaintiff was guilty of contributory negligence which resulted in his injury, and for that reason cannot recover.

3. And for the reason that the verdict of the jury was contrary to the evidence, against the evidence, and is wholly unsupported by the testimony in said cause.

And in the alternative and in the event the foregoing motion for judgment notwithstanding the verdict shall be by the Court denied, defendant respectfully moves and petitions the Court to set aside the judgment entered in this cause upon the verdict of the jury, and to grant to defendant a new trial upon the following grounds and for the following reasons:

1. That the verdict of the jury is not sustained by sufficient evidence.

2. There was no testimony tending to sustain the verdict.

3. Said verdict was contrary to law.

4. The Court erred in refusing to grant the defendant's motion for non-suit and for a dismissal of said cause upon the undisputed evidence that plaintiff assumed the risk of the injury he received, and upon the further ground and undisputed testimony plaintiff was himself guilty of such contributory negligence that he could not recover.

5. The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. 1, namely, that upon the allegation of plaintiff's complaint and upon his testimony in the cause, it was not the duty of the defendant to warn him of the danger which was apparent and which he testified he knew, and that he had assumed the risk and could not recover.

6. The Court erred in refusing to instruct the jury as requested by the defendant in its second requested instruction, namely, that if a person working with a defective or unguarded machine, without complaint, knowing of the dangers of the defective or unguarded part, is injured thereby, he cannot recover.

7. The Court erred in refusing to instruct the jury as requested by the defendant in its requested instructions Nos. 3, 4, 5, 6, 7, 8 and 9.

8. The Court erred in permitting the plaintiff's witness Savage, over the objection of defendant's counsel, to testify that he had placed guards upon the cog wheels of the motor that the plaintiff was operating, and further, in permitting said witness Savage to testify over the objections of defendant's counsel that guards could have been put upon the cog wheels upon which the plaintiff was injured, to which ruling exception was duly taken at the time.

9. That in support of the first ground for motion for new trial based upon the insufficiency of the evidence, and in compliance with the rule of this Court, counsel for the defendant specifies the particulars wherein said evidence is insufficient, as follows:

1. It is alleged by plaintiff in his amended bill of complaint that plaintiff on and prior to the date of his injury was ordered by the foreman or superintendent, acting for the

defendant corporation, to oil said cogs and gears while the same were in motion, and that the plaintiff, while exercising due care and without fault or negligence on his part, attempted to oil said cogs and gears while in motion, in obedience to defendant's direction, and that he came in contact with said cogs and gears and had his right arm caught therein and received the injury of which he complains, and that he had done said oiling about four or five times prior to the happening of the accident, and plaintiff testified as a witness in his own behalf that he had oiled the cogs and gears on several occasions prior to the accident. That when oiling them he had stood on a platform in front of the wheels and that the running cogs were within twelve to fifteen inches of his face and in plain view. The following questions being propounded to the witness and the following answers were given by him:

"Q. When you stood on the platform in front of those cog wheels, your face was as close to the cog wheels as my face is to you now, about a foot and a half or two feet? Is not that a fact?

A. Just about one foot.

Q. Now, standing in front of those cog wheels, you were attempting, you said, to oil the cogs; is that right?

A. He puts it in the box. He did not put it in the wheels.

Q. Your counsel asked you if you were oiling the cog-wheels and you said yes, but you were oiling the boxing—you were not oiling the cog wheels, but you were oiling the boxing that carried the shaft upon which the cogs operated, is that the fact?

A. Well, he oiled both of them—the cogs and the boxes.

Q. When you stood on this platform these cog wheels in which you got your arm caught were right in front of your face?

A. Yes.

Q. Now, you were going to put oil in this bearing and also oil the bearing back there that carried the big wheel, were you not?

A. Yes sir, on all sides.

Q. All four of them?

A. On all four of them.

Q. (p. 34) Which one were you oiling when the cog caught your sleeve, which bearing were you oiling—which one were you putting oil on when your sleeve got caught?

A. On the other shaft—the one behind there. On the right hand side.

Q. (35) You just held your can up over the cog wheels and let the oil drop down where one wheel ran into the other, did you?

A. Yes sir.

Q. (p. 36) Now after you oiled those bearings at the right hand side of the machine as you faced it, then you reached your right arm across to oil the bearing that was farthest away from you on the left, and in doing so you got your sleeve over into those cogs, that's right, isn't it?

A. Yes.

Q. (p. 38) But when you oiled those cogs, that is what you did every time—you kept the spout off the cogs, didn't you?

A. Yes.

Q. Why did you keep the spout off those cog wheels when you were oiling the cogs; why didn't you put it down into the cogs?

A. He takes the hard grease, he says, it is hard, and he throws it into the box—sometimes a little will drop on the wheels, and let it drop down.

Q. Why didn't you take the hard grease with your hands when the machinery is running and put it into the cog wheels —why didn't you do that—why did you let it drop over—you knew better than that, didn't you?

A. What would he take his hand and put it on there when he knew better?

Q. You knew if you put your hand into those cog wheels for any purpose at all when the machinery was running it would cut your hand off, didn't you?

A. He says he is not crazy enough to do anything like that."

10. The Court erred in so much of its general charge to the

jury as left it to determine whether or not the defendant had furnished the plaintiff a safe place in which to work, and instructing the jury that the failure to exercise due care to make the place and surroundings reasonably safe for employes is a neglect of duty which is a legal wrong, and when an injury is suffered in consequence of that kind of a wrong, the employer is liable on the principle of rendering compensation for an injury suffered in consequence of his wrongful conduct.

11. The Court erred for the reason that upon the undisputed testimony of the plaintiff himself he knew that the cogs existed at the place where they were; he knew they were in operation; he knew that if his hand came in contact with them, or the sleeve of his coat, that he would be injured, and he performed the work of oiling these bearings and cogs without any complaint and voluntarily assumed the risk of the injury he received, and waived the application of the doctrine of "Safe Place" to the situation which existed at the time of his injury.

12. The Court erred in its charge to the jury in instructing the jury that it should only require the plaintiff to exercise such faculties and capacity as he is endowed with by nature for the avoidance of danger, and in not instructing the jury, as a matter of law, that the danger was open and visible, as well as known to the plaintiff, and that if such danger was known to a man of ordinary care and prudence in the conduct of such business, the plaintiff himself would be charged of the notice as a matter of law.

KERR & McCORD,
Attorneys for Defendant.

State of Washington,
County of King—ss.

J. A. Kerr, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing motion, knows the contents thereof, and believes the same to be meritorious and well founded in law.

J. A. KERR.

Subscribed and sworn to before me this 10th day of October, 1911.

(Seal) J. N. IVEY,
Notary Public in and for the State of Washington, residing at Seattle.

Copy of within Motion received and due service of same acknowledged this 11th day of October, 190...

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Motion to Set Aside Judgment. Filed U. S. Circuit Court, Western District of Washington, Oct. 11, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Complainant,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

On application of Kerr & McCord, attorneys for the defendant above named, and for good cause shown, the motion for judgment notwithstanding the verdict and in the alternative for new trial not having yet been passed upon by the trial Court;

It is ordered that the time within which the defendant may file its bill of exceptions in the above entitled cause to matters occurring at the trial and duly excepted to, be extended by the Court from October 20, 1911, to which date the same was ex-

tended by order heretofore made and entered by this Court, to the 15th day of November, 1911, in which to file and serve its bill of exceptions.

Done in open court this 16th day of October, 1911.

C. H. HANFORD, Judge.

O. K. Herbert W. Meyers, Atty. for Complainant.

Indorsed: Order to Extend Time to File Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, Oct. 16, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff.*

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*

No. 1934.

PLAINTIFF'S BRIEF

ON MOTION *NON OBSTANTE* AND NEW TRIAL.

In its motion for judgment *non obstante veredicto* and in the alternative for a new trial, the defendant has based his right to such action by the Court upon the grounds of the assumption of the risk by, and the contributory negligence of, the plaintiff, alleging that because thereof, the verdict is contrary to and not sustained by the testimony and the evidence, and is contrary to law; and asserts that the Court erred in refusing to grant a nonsuit, when the motion for nonsuit was made immediately after the close of the plaintiff's evidence, in view of the plaintiff's assumption of the risk and his contribu-

tory negligence; also, that the Court erred in its instructions to the jury and in its failure to instruct the jury according to the request of the defendant.

It is asserted that the "undisputed testimony" of the plaintiff showed that the plaintiff assumed the risk of injury in the manner in which the injury occurred, and, also, was negligent; and it is presumed that the testimony set out in its motion to set aside the judgment is referred to, since it is but reasonable to suppose that it would cite in its motion the strongest "undisputed testimony" which the transcript would disclose.

Assuming such to be the fact, the question arises at once, is that testimony undisputed, and, if it be undisputed, does it indicate that the plaintiff knew of, understood and appreciated the dangers to which he was exposed by reason of the defendant's negligence.

The climax of this testimony is reached in the last question and answer quoted, viz:

Q. "You knew if you *put your hand into those cog wheels* for any purpose at all when the machinery was running, it would cut your hand off, didn't you?"

A. "He says that he is not crazy enough to do anything like that."

The Court will readily distinguish the difference between putting one's hands in among cog wheels, and reaching over such cogs to put oil on a bearing of the machine of which the cogs were a part. Plaintiff was oiling the bearings and not thrusting his hands into the cogs, as defendant would have us believe.

The knowledge of a possible injury one may suffer if he deliberately places his hand in exposed cogs or wheels, as distinguished from his knowledge of the danger to him from a situation in which he is placed by reason of the negligence of another in not furnishing safe surroundings and suitable instrumentalities in and with which to work, is distinguished in a case in the Circuit Court of Appeals, Second Circuit, decided January 9, 1911, in which case the parties and the facts were practically no different from those in the present case. In

that case, the defendant alleged that the plaintiff, who was a Russian Pole, speaking and understanding the English language imperfectly, a common laborer, while working for the defendant had his right arm caught in a machine and so crushed and mangled that amputation became necessary, was negligent in that he endeavored to put certain material into a machine while it was in motion; the injury occurring four and one-half days after he had first commenced to work with the machine. The defendant's theory there was, as is contended in this present case, that the plaintiff instinctively knew of the danger. In the opinion in the case, *American Manufacturing Company v. Zulkowski,* C. C. A. 146, the Court, through Coxe, Circuit Judge, said:

"In deciding that the defendant's theory was not a fair version of the accident, the jury were justified in considering the ordinary instincts of self-preservation which govern human conduct. *Even the most ignorant laborer would have known that if he placed his hand in such a position it would surely be caught and injured. No expert knowledge was required to enable him to appreciate this self-evident fact. * * * The jury were justified in considering the improbability that he would do an act which would impeach his sanity.*"

Thus, it is held that while a person's instinct may create within him a certain fear due to his surroundings yet not induce such knowledge as would bring him to *understand and appreciate* the danger, so as to charge him with negligence in having encountered it.

The recognition of this distinction between instinctive fear and actual knowledge and appreciation of danger, as applied in cases of this character, is well stated by this Court in the case of *Nottage v. Sawmill Phoenix*, 133 Fed. 979, wherein Your Honor said:

"The law does not place upon employes an obligation to investigate conditions and assume the risk of accidents which happen from dangers which might be revealed by a reasonably thorough inspection of places and appliances, but merely takes for granted that by voluntarily entering into employment or continuing therein, they do thereby assent to the exposure of

themselves to *all such as are necessarily obvious to them in view of their capacity, knowledge and experience, each case being judged by its peculiar facts.*"

These cases just cited go to establish the rule that where a servant either does not know, or, knowing, *does not appreciate such risks;* and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries; and the natural corollary that if the employer knows, or ought to know, that the dangers for the employment are unknown to or not appreciated by the servant, the servant should be instructed so that he may reasonably understand the perils. That such is the rule of law is well supported by decisions of the highest courts.

Choctaw, etc., R. Co. vs. McDade, 191 U. S. 64. (48 L. Ed. 96.)
Railroad Co. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
Voelker v. Railroad Co., 116 Fed. 867.
Railroad Co. v. Holloway, 52 C. C. A. 260 (114 Fed. 458).
Pierce v. Calvin, 27 C. C. A. 227 (82 Fed. 550).
Davison v. Railroad Co., 44 Fed. 475.
Bean v. Navigation Co., 24 Fed. 124.
Thompson v. Railroad Co., 18 Fed. 239.
Railroad Co. v. Linstedt, 106 C. C. A. 238.
Mather v. Rillston, 156 U. S. 391 (39 L. Ed. 464).
Lathi v. Rothschild, 60 Wn. 438.

The mere fact that the employe knows there is danger will not defeat his right to recover if in obeying the order of his employer he acted with ordinary care under the circumstances.

Allen v. Gilman, McNeil & Co., 127 Fed. 609.
R. R. v. Linstedt, 106 C. C. A. 238.

In the case of the *Atlantic Coast Line Railroad Co. v. Linstedt*, 106 C. C. A. 238, decided late in the year 1910, it is said:

"The defendant cannot, as a matter of law, defeat the right of the plaintiff to recover merely because the danger of riding on a brake beam was apparent, if the safety and suitableness of the same as an appliance was in issue, and the inexperience,

lack of knowledge and failure of warning to the plaintiff was also present.

"In such case, involving a neglect by the master of the primary duties imposed upon him, *it must be made to affirmatively appear that the servant not only apprehended the danger thus arising from the master's neglect, but that the particular peril or hazard was appreciated by him.*

Authorities to support these views might be given almost without number. *Butler v. Frazee*, 211 U. S. 459, 466, 469, 29 Sup. Ct. 136, 53 L. Ed. 281, an opinion by Mr. Justice Moody, will be found to contain a particularly interesting discussion of the subject, with citation of authorities."

In the case of *Butler v. Frazee*, 211 U. S. 459, 53 L. Ed. 281, is said:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employe must be held, as a matter of law, to *understand, appreciate and assume* the risk of it."

Railroad Co. v. Swearingen, 196 U. S. 51 (49 L. Ed. 382).
Fitzgerald v. Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537.
R. R. v. Jarvi, 53 Fed. 651 (3 C. C. A. 433).

In *Railroad v. Swearingen*, 196 U. S. 51 (49 L Ed. 382), the following language was employed:

"As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 *could not be imputed to the plaintiff simply because he was aware of the existence and general location* of the scale box, *it was for the jury* to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual *knowledge of* the danger."

Indeed, it has been said that a servant who does not *appreciate* the dangers to which he is subjected is not to be held to have assumed the risks of the employment only, but that he *cannot consent* to assume them. In *Felton v. Girardy*, 104 Fed. 127, the opinion by Lurton, Circuit Judge, says:

"If the employment be of a dangerous character requiring

skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that from his youthfulness, feebleness, *incapacity or inexperience, does not appreciate them, the servant cannot, even with his own consent, be exposed to* such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and with proper care on his part, do his work safely."

The same Court, by the voice of the same Judge, said in *Railroad Company v. Miller*, 104 Fed. 124:

"It is illogical to say that a servant impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant; unless the dangers are so obvious that even an *inexperienced man could not fail to escape them by* the exercise of ordinary care.

The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from want of the degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation with safety to the operator, as when the disqualification is due to youthfulness, feebleness, or general incapacity.

If the master has notice of the dangers liable to be encountered, *and notice that the servant is inexperienced*, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duty."

In the case of *Clow & Sons v. Holtz*, 34 C. C. A. 550, the Court left the question to the jury to say whether the car by which the plaintiff was injured, as constructed, with certain wedges which had been added and of which he knew, was a machine which a reasonably prudent employer would furnish to his servants to be used in his business, and charged the jury that if the dangerous character of the machine was so obvious that an ordinarily intelligent laborer of the class of laborers to which the plaintiff belonged must or should have

observed its danger, and the plaintiff nevertheless continued in the employ of the master without complaint, he assumed the risk incident to such employment, and was guilty of contributory negligence, should injury occur.

The Circuit Court of Appeals, in an opinion by Taft, Circuit Judge, said:

"The only point upon which we feel the slightest doubt in this case arises upon the motion which was made by the defendant, at the close of the plaintiff's evidence, to take the case away from the jury and direct a verdict for the defendant, on the ground that the plaintiff *must have known* the dangers incident to the use of the machine from the use of which the injury happened, *and must therefore have assumed the risk.*

Now that the accident has happened, now that the measurements are given, now that the weight of the cores are accurately known * * * it may be difficult to understand how anyone with the slightest knowledge of mechanics could fail to appreciate the dangers arising from the use of this car with the cores adjusted as they were. But it must be borne in mind that the plaintiff was a *common laborer;* that the safety of the machine had been brought to the attention of the superintendent and managers of the foundry; that the car had been operated for six months without injury, and that the plaintiff had a right to assume that his master would exercise due care in his behalf in keeping the machinery and appliance safe.

In the light of these considerations, *we cannot say that the question of the plaintiff's negligence, or the question of the amount of risk which he assumed, was not a* question for the jury.

It was left to them with the proper and discriminating statements of the law, and application of the law to the facts.

The jury found that the circumstances were such that he was not charged with the knowledge of the danger incident to the use of that machine.

We do not think the course of the Court, in leaving this issue open to be settled by the jury, was erroneous."

In *Deninger v. American Locomotive Co.*, 107 C. C. A. 127, decided February 6, 1911, Gray, Circuit Judge, said:

"The defendant, however, relies strongly upon the proposition that the risks of the situation were all known to and appreciated by the deceased, and therefore assumed by him as risks of his employment. Certainly this is true of the ordinary risks inherent in the employment, but it is not true of the risks or danger arising from the default of the defendant.

Whatever the risks assumed by a servant in entering upon his employment may be, the one risk he does not assume, is that arising from the negligence of his employer. * * *

The law deals with men in their various relations in life, as endowed with average intelligence and capacity, and recognizes their limitations, and that under certain circumstances, inadvertence and distraction may be excusable, where under other circumstances they would constitute a serious default. *If, then, the absence of the automatic safety device, which in efficient operation would have prevented the accident, was due to a want of reasonable care on the part of the master, the risk arising from its absence was not one of the risks assumed by the deceased in entering upon his employment.* Though this risk, arising from the negligence of the master, was not thus assumed, yet it is true that, if the deceased was *aware of and appreciated the danger* therefrom he might, by his own negligence in exposing himself thereto, have contributed to his injury, and thus debarred himself from recovery. But there is no affirmative proof of such negligence on the part of the plaintiff, and no fact referred to from which such negligence can be properly inferred as a matter of law. The facts and testimony bearing upon the question were, however, submitted to the jury with proper instructions by the Court below.

In considering, on the evidence, the question as to how far primary duty of the master was performed, in providing the safe place in which to work and the safe appliances with which to work, it must be remembered that there was no compulsion on the defendant to use this dangerous hand lever in the operation of its machine. There was testimony before the jury, to be given such weight as they determined justly attached to it, that these levers were first used in these new and large machines; that this very head had been frequently operated with

a wheel of moderate size, and that it had been so operated ever since the accident. Obviously, the use of the wheel for the purpoes that the lever was used for, would have avoided all the dangers attending upon the latter. The mere fact that it required more power to move a wheel of moderate diameter, would not necessarily excuse the defendant from adopting it, in view of the tragic experience in its own shops with the hand lever. No mere economy, pecuniary or otherwise, can excuse a master from the performance of the primary duty imposed upon him to make a reasonably safe place in which his servant is to work.

This case was submitted to the jury by the learned judge of the Court below, and with this evidence all before it, it found a verdict in favor of the plaintiff. A motion for premptory instructions for the defendant was denied by the Court, and after verdict, motion for a new trial and for judgment, *non obstante veredicto,* was made by the defendant, which latter motion was granted by the Court, and a judgment entered accordingly. *We think this case should not have been disposed of, and there was evidence sufficient to go to the jury and to warrant the verdict rendered."*

It may be contended by the defendant that the rule of the law in the State of Washington differs from the rule as laid down in the cases cited. The opinion in the case of *Lahti v. Rothchild,* 60 Washington, 438, rendered in November, 1910, says:

"Learned counsel for appellant contend that the use of the large link chain for handling this lumber, and the evidence tending to show that it was not suitable for that purpose, was a sufficient showing of negligence on the part of respondents to call for the submission of that question to the jury. This contention we think is well founded, unless it can be held, as a matter of law, that appellant assumed the risk incident to the use of the chain because of his knowledge of such use and the danger thereof. It seems to us that a jury might well be justified in believing from this evidence that the risk incident to the use of this large link chain was extraordinary. That is, *that it was a risk which could have been obviated* by the

exercise of reasonable care on the part of respondents. 1 Labbatt, Master and Servant, S 270. Hence, its use might justify a finding of negligence against respondents, though it may be conceded that it would not be such negligence but that liability therefor could be obviated by appellant's assuming the risk. Now, can it be said, as a matter of law, upon this record, that appellant assumed this risk, supposing that the jury might conclude that the risk was extraordinary. This question must be answered in the light of the evidence touching appellant's knowledge of the use of the chain, *and also his knowledge of the danger incident to its use.* Of course, he knew of the use of the chain, but before he can be charged with assumption of the risk, it must appear that he *comprehended the danger* as well as knew of the physical conditions. Bailey, Master's Liability for Injuries to Servants, 184; Wood, Law of Master and Servant (2d Ed.), S. 376; *Shoemaker v. Bryant Lum. & Shingle Mfg. Co.,* 27 Wash. 637, 68 Pac. 380.

In 1 Labatt on Master and Servant, S 271, the rule is stated as follows:

"An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and *comprehended* by the servant, or—as the same conception may also be expressed in logically equivalent terms—where the servant is chargeable neither with an actual nor a constructive knowledge and *comprehension of the risk.*"

Learned counsel for respondents contend, in substance, that the evidence of appellant's experience as a longshoreman is sufficient to impute to him a *comprehension of the dangers* of using this large link chain, and that the trial court was justified in so determining as a matter of law. It is true that appellant appears to be a longshoreman of considerable experience. He tells us in his testimony, however, that he never had experience in the use of a chain of this size in handling pieces of these dimensions, and did not know that such chain could not securely hold a sling load of such pieces. We have seen that he worked there five or six days under these conditions without anything occurring that would suggest such danger to him. *If he comprehended,* or was bound to compre-

hend, such danger, it was only because of his general knowledge of, and experience in, the business. It seems to us the danger was not so apparent that it can be decided, as a matter of law, that a reasonable person in his position and *with his knowledge and experience* was bound to *know and comprehend* the risk incident to the use of this chain. *We think reasonable minds might differ upon this question, and that it was therefore a question for the jury.* We conclude that the learned trial court erred in taking the case from the jury at the close of appellant's evidence."

What are the "peculiar facts" in this case at bar with respect to the capacity, knowledge and experience of the plaintiff, as shown by the evidence in the case, and upon which should be based the decision as to whether or not the danger incurred by him in working about the cogs which caused his injury was necessarily obvious to him, in view of the opinion of this Court in the case of *Nottage v. Sawmill*, referred to heretofore?

The plaintiff was an *uneducated* man, who does not *speak nor understand* the English language. He testified that he was employed in the capacity of a common laborer, that he had no knowledge of machinery, had never worked about it, never saw a set of cogwheels prior to beginning work for the defendant company, and was not instructed as to the manner of doing the work nor of the danger which he would encounter in doing it. Upon cross-examination he re-asserted that he had never worked with machinery other than the pick and shovel, nor about it, nor in mines, and was totally ignorant of it. *His testimony is absolutely undisputed.* It is evident, therefore, that, as a matter of law, he was disqualified to do the work assigned to him in the oiling of the cogs which caused his injury, because of his want of capacity, lack of knowledge and inexperience, and consequent failure to *appreciate and actually know the danger incident to such work.*

Transcript, pp. 27, 28, 29.

The Circuit Court of Appeals, Ninth Circuit, in an opinion by Gilbert, Circuit Judge, in *Puget Sound El. Ry. v. Van Pelt*, 93 C. C. A. 492, said:

"To make a complete and valid defense on that ground, it

should be proved by a fair preponderance of the evidence that the plaintiff himself was informed as to the risk there was; the nature of the danger in which he was placed for work, with that fuse located as it was. The law does not under any circumstances exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond that he has the right to assume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. * * * He is chargeable with the assumption of risks that are necessarily incident to the employment, and with the assumption of risks which he knew about, *of which he had knowledge—actual knowledge*—and also the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake."

Could it be possible to conceive of a more thoroughly irresponsible person in the situation in which this plaintiff was placed when he was ordered to oil the cogs, gears, etc., which caused his injury, or one having less experience or capacity and less capable of *understanding and appreciating* the dangers incident to the work to be done; or one more completely within the exceptions announced in the cases which have been cited above? Can it be said, either as a matter of law or as a matter of fact, that the plaintiff in this case, upon the evidence in the case, *appreciated* the danger he encountered? If he did not, then, as a matter of law, he did not assume the risk.

The defendant insists that the Court should have granted the motion for nonsuit when made by it at the close of the testimony in behalf of the plaintiff, upon the ground that there was evidence that the plaintiff contributed to the happening of the accident by his own negligence, as shown by the testimony, for which reason he could not recover.

In ruling upon this motion for nonsuit, your Honor said, in part:

"For the purposes of this trial, the Factory Act is eliminated from the case, and the question of negligence is to be found by the jury to entitle the plaintiff to recover any dam-

ages. I think there is enough evidence in the case to require you to make your defense, or at least require the Court to submit the case to the jury under the rulings of the Circuit Court of Appeals for the Ninth Circuit, which has the controlling voice in a case litigated in this Court."

Transcript, p. 77.

Your statement that "the question of negligence is to be found by the jury to entitle the plaintiff to recover damages" is a statement universally supported by the Courts. As was stated by the Supreme Court of the United States in the case of *Davidson Steamship Company v. United States,* 205 U. S. 187 (51 L. Ed. 766):

"Now, whether the injury was the result of negligence, and which party was guilty of negligence, are questions of fact properly determinable by the jury. * * * The settled rule is that where negligence is a mere question of fact, and nothing appears which is negligence per se, the determination of the question is peculiarly the province of the jury, and its conclusions will not be disturbed unless it is entirely clear that they were erroneous.

Courts do not approach the question as an original one, and consider whether, in their judgment, the testimony does or does not prove negligence, but accept the determination of the jury, if there is any evidence upon which it can be rested. This is the general rule in respect to all mere questions of fact.

Authorities in this Court, as well as in others, are abundant and clear on this point."

Railroad Co. v. Fraloff, 100 U. S. 24 (25 L. Ed. 531).
Kane v. Railroad, 128 U. S. 91 (32 L. Ed. 339).
Jones v. Railroad, 128 U. S. 443 (32 L. Ed. 478).
Dunlap v. Railroad, 130 U. S. 649 (32 L. Ed. 1058).
Railroad Co. v. McDade, 135 U. S. 554 (34 L. Ed. 235).
Railroad v. Converse, 139 U. S. 469 (35 L. Ed. 213).
Railroad Co. v. Powers, 149 U. S. 43 (37 L. Ed. 642).
Hackfeld & Co. v. United States, 197 U. S. 442 (49 L. Ed. 826).
Hall v. Northwest Lumber Co., 61 Wash. 355.

Easterly v. Lumber Co., 60 Wash. 647.
Lahti v. Rothchild, 60 Wash. 438.

In the case of *Lahti v. Rothchilds*, 60 Washington, 442, it is said:

"We think reasonable minds might differ upon this question, and that it is therefore a question for the jury."

In *Atlantic Coast Line R. R. Co. v. Lindstedt*, 106 C. C. 238, the Court says:

"In a case, as here, however, where the plaintiff bases his right of recovery on the unsafe and defective appliances of the defendant, and sets up his own infancy, and the defendant relies as a defense upon the plaintiff's assumption of risk and contributory negligence, and the plaintiff's inexperience, and the defendants failure to instruct him in his duties, or, properly warn him against unusual danger or hazard incident thereto appearing, then, in such case, it at once becomes material to determine whose negligence really brought about the disaster, that of the plaintiff in not properly performing the duties required of him, or the defendant in failing to perform some duty imposed upon it, which can only be ascertained from a full consideration of all of the facts and circumstances surrounding the occurrence; *and the jury is the proper tribunal to settle disputed issues of fact thus arising, if any there be, as in any other case.*

Just when, and when not, issues of fact in cases of this character should be withdrawn from the jury, seems now too well settled in the Federal practice to admit of serious controversy. 'The question of negligence is one of law for the Court only where the facts are such that *all reasonable men* must draw the same conclusion from them, or, in other words, a case should not be drawn from the jury unless the conclusions follow as a matter of law, that no recovery can be had upon any view which can properly be taken of the facts the evidence tends to establish. *Gardner v. Mich. Cent. R. R. Co.*, 150 U. S. 349, 361, 14 Sup. Ct. 140, 144, 37 L. Ed 1107, supra; *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 258, 29 Sup. Ct. 619, 53 L. Ed. 984. In this case disputed questions of fact having arisen as to the *suitableness and safety of the ap-*

pliances furnished by the defendant to the plaintiff, with which to perform the service required of him, and the necessity for the use thereof by plaintiff when injured, as well as over the plaintiff's capacity properly to perform the service in hand, in the light of his youth, knowledge and experience, and whether, because thereof, and from lack of instruction and proper warning, he either did not know of the danger in which he was placed, or, if apprehended, it was *not appreciated* by him, and as to all of which there was a considerable conflict in the testimony, it was *manifestly proper for the trial court to overrule the motion for nonsuit, and to instruct a verdict for the defendant*, and to submit the same to the jury under proper instructions as to the law applicable to the case, which was done, with such degree of fairness to the defendant, that no objection thereto was made by it, though the plaintiff excepted to the rejection of sundry requests for charge to the jury asked by him. Under these circumstances, a verdict having been returned for the plaintiff, which has met with the approval of the trial judge who saw and heard the witnesses testify, and was therefore peculiarly able to judge of the weight that should have been given by the jury to their several statements, this Court would not be justified in disturbing the judgment thus entered, particularly on a motion to either withdraw the case from the jury, when the view of the testimony most favorable to the plaintiff must be taken." *Kreigh v. Westinghouse Co.*, 214 U. S. 249, 253, 29 Sup. Ct. 619, 53 L. Ed. 984, supra.

The C. C. A. 9th Ct. in *Railroad v. Lundberg*, 100 C. C. A. 323, holds that:

"Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. The question of assumption of risk also involved consideration of the facts and circumstances adduced upon the trial, and was properly submitted to the jury."

See, also, *N. P. R. Co. v. Charles*, 51 Fed. 562.

With respect to the merits of the defendant's contention

when viewed in the light of the facts, it will be remembered that in this case the plaintiff alleged that the injury done to him was due, among other things, to the negligence of the defendant in not furnishing a safe place and suitable instrumentalities in and with which to work, having "failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected (p. IV), and, also "that the carelessness and negligence aforesaid consisted in failing to provide and maintain reasonable safeguards for the aforesaid cogs, shafts and gearing." (P. VI.)

That it was the duty of the employer to provide a safe place and suitable instrumentalities in and with which his employees were required to work cannot be questioned in view of the decision in the case of *Kreigh v. Westinghouse*, etc., 214 U. S. 249 (53 L. Ed. 984), wherein the Supreme Court said:

"The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this Court, and is now so thoroughly settled, as to require but little reference to the cases in which the doctrine has been declared."

Railroad Co. v. Mackey, 157 U. S. 72 (39 L. Ed. 629).
Railroad Co. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
Railroad Co. v. McDade, 191 U. S. 64 (48 L. Ed. 96).

The case of *Railroad Co. v. McDade*, 191 U. S. 64, is one in which the Supreme Court goes into detail with regard to the duty of the master, and says:

"Where no necessity exists, as in the present case, for the use of dangerous appliances, and where it is a matter requiring only due skill and care to make the appliances safe, there is no reason why an employe should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer.

"We agree with the Circuit Court of Appeals in affirming the instructions upon this subject given by Judge Hammond to the jury, in which he said: 'It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience,

so free from any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, *that not to make such a construction safe for brakeman on trains is a conviction of negligence.*' "

In *Mather v. Rillston*, 156 U. S. 391 (39 L. Ed. 464), it is said:

"Occupations, however unimportant, which cannot be conducted without necessary danger to life, body or limb, should not be prosecuted at all without reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual dangers there must be used all appliances readily attainable known to science for the prevention of accidents, *and the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence.*"

In *Cox v. Coal Co.*, 61 Wash. 347, it is said:

"It was the duty of the master to see that the mine was properly timbered, and if you find from the evidence that there were safe and unsafe ways of timbering the mine known to the defendant, then it became the duty of the defendant to adopt the safe way." And if the safe way was not adopted, the defendant was negligent.

In *Housen v. Seattle Lumber Co.*, 41 Wash. 354, it is said:

"It is the duty of the defendant to use all reasonable care and forethought to provide appliances necessary to the safety of the plaintiff and such appliances as would avoid injury to its employes, so far as it could possibly be done."

These cases to establish the rule that the employer must provide suitable surroundings for his employes, they do not define what may be deemed safe places and suitable instrumentalities. What may be deemed to be the performance of his duty by an employer in so far as providing a safe place in which to work is well stated in *Deninger v. American Locomotive Co.*, 107 C. C. A. 127, decided February 6, 1911. In the opinion Gray, Circuit Judge, said:

"Must not an employer, to reasonably live up to his pri-

mary duty in this respect, consider a situation which might be called extraordinary, and protect where he can protect, by using the care required by such situation, an operator from dangers to which he may be exposed by reason of inadvertence or distractions which may happen to men of average intelligence and prudence?

Can it be said that, in view of the foregoing facts, the defendant had used all the care that was incumbent upon it to use, in order to render the place in which the deceased was required to work, reasonably safe? To use that degree of care was the primary duty imposed by law upon the defendant—a duty not to be avoided, and the responsibility of which could not be delegated. We think there was evidence, sufficient at least to go to the jury, as to whether the defendant had not fallen short of the degree of care required of it in the premises, by removing the automatic safety device operating, as described, in the handle and collar of the lever. The evidence shows, and it is admitted by the defendant, that the deceased came to his death by having his skull crushed by the revolution of this hand lever. The pinion was then in engagement with the feed wheel, and the power must have been communicated from it to the pinion and sleeve to make the latter revolve. But this accidental revolution of the sleeve would not have caused the hand lever to revolve, unless the pawl thereon had been engaged with the ratchet on the sleeve. It was equally clear that this could not have been the case, if the automatic safety device had been attached to the hand lever and in working order.

It is true, that by constant and unremitting attention to those precautions which it is to be assumed *he knew* were necessary, the danger might have been avoided; *but can a place and situation in which a servant is required to work be said to be reasonably safe, where possibly excusable distraction of the operator's attention may cause the omission of some precaution necessary to his safety, and where the penalty of such omission is instant death or serious bodily harm?* In the present case, it seems to be established by the evidence that the deceased apprentice was fairly well acquainted with the operation of this large and dangerous machine, and that he was in-

had been put to work upon a dangerous machine without proper instructions to enable him to conduct himself safely in operating it, then the defendant is guilty of negligence."

Denninger v. American Loco. Co., 107 C. C. A. 127, says:

"Whether the servant in a given case has contributed, by his own negligence, to the negligence of the master, in causing the injury complained of, is another question, to be determined against him only by evidence sufficient to rebut the presumption of due care on the servant's part. *It will be a question for the jury to say whether the deceased is to be considered in fault and to have contributed to the accident causing his death*, because, *while standing in front of this powerful machine, compelled to operate the levers controlling* the power on the one hand, and on the other, to watch with unremitting attention the combination of the hand lever with the sleeve and pinion, and to take the detailed precaution necessary to avoid the danger we have spoken of, he may have omitted, in a moment of inadvertence or distraction, some one of the precautions necessary for his safety."

At the close of plaintiff's testimony, there was sufficient evidence to warrant the Court in holding that the defendant was negligent, to the extent of leaving no doubt in the minds of reasonable men as to his culpability in that respect, since the Court, itself, stated that there was sufficient in evidence to require the defendant to make his defense, which view was, after the defendant had put its case in, supported by the verdict of the jury.

Page 77, Transcript.

The Court did not err in denying defendant's motion for nonsuit, at the close of plaintiff's case, since there was testimony which, if not contradicted, would sustain the main allegations of the complaint, and that it was not overcome by the testimony of witnesses for the defendant is established by the verdict of the jury.

In *Kreigh v. Westinghouse, etc.*, 249 (53, 984), it is said:

"Questions of negligence do not become questions of law to be decided by the Court, except where the facts are such that all reasonable men *must* draw the same conclusion from them;

or, in other words, a case should *not* be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon *any view which can be properly taken of the facts the evidence tends to establish.*"

Gardner v. R. R. 150 U. S. 349 (37-1107).

Twelve men of the average of the community comprising men of education, men of learning, and men whose learning consists only of what they have themselves seen, heard and experienced—merchants, mechanics, ranchers, bankers, clerks, laborers, an employer of labor who had himself defended a personal injury suit, sat together, listened attentively to the proof submitted by both sides to the controversy, consulted with another, and applied their separate learning and experiences of the affairs of life to the facts as proven, and drew a unanimous conclusion, and it is this average judgment of such men, under proper instruction as to the law by the Court, in a contested case that the law strives to obtain.

Objection is made to the testimony of witness Savage, wherein he stated that he had placed guards upon the cog wheels of the motor that the plaintiff was told to operate; and, also, that the guards could have been put upon the cog wheels which injured the plaintiff.

If the evidence was material it was admissible. If it was immaterial, or irrelevant, error in admitting it would depend upon whether or not it was prejudicial to the defendant.

Cox v. Coal Co., 61 Wash. 348.

It was introduced for the purpose of establishing the fact of the ignorance, incapacity and inexperience of the plaintiff and the fact of the negligence of the defendant, as set forth in the complaint, and as such, was material and relevant.

In *Hansen v. Lumber Co.*, 41 Wash. 353, it is held, with respect to the admission of such evidence:

"This evidence was introduced and admitted for the avowed purpose of showing the defective and dangerous condition of the cog wheels, and that appellant knew thereof. We think it was admissible for that purpose."

Merst v. Coal Creek R. R. Co., 42 Wash. 179, holds that such

evidence is admissible when pertinent and directed to the proof of the allegations of the complaint.

In *Shaw v. Shingle Co.*, 61 Wash. 58, will be found a full statement relating to the admission of evidence of the character to which objection is made in this case, in that case:

"A witness was asked whether he had seen a guard, a model of which was exhibited, or similar guards in use in shingle mills. After objection and some colloquy, the Court ruled that the witness could "testify as to whether or not it is practicable to put a guard upon a saw of that kind."

No exception was taken to this ruling, and the witness answered, "It is," and it was held not error to admit it.

This case also holds that the admission of proof of a custom to guard exposed machinery was not error.

"We think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripsaws; not that a compliance with the particular custom would necessarily exonerate, or noncompliance necessarily charge it with negligence; but its conduct in that regard was a material fact for the consideration of the jury, in connection with other facts and circumstances developed by evidence in the case." * * *

That the rule may not be abused it has been held that the ordinary discretion vested in a trial judge is to be exercised in allowing or rejecting this character of testimony.

In determining what machinery can and what cannot be effectively guarded in this matter, you may take consideration what is the custom of other prudent persons operating similar machinery with respect to guarding the same. * * *

It may aid the jury in determining the practicability of this guard or not. This is an issue in this case.

On the question whether the employer has exercised reasonable and ordinary care in providing and maintaining safe appliances, and places for work, the plaintiff may show the general practice of other employers in similar lines of employment in these respects:

Olesen v. N. O. Lumber Co., 119 Fed. 77.
Spiro v. Fellon, 73 Fed. 91.
Crocker v. Co., 34 Wash. 191.

Now, if evidence to show custom of others in guarding machinery is admissible, is not evidence of the fact that the defendant itself had put guards upon similar machinery which it set the plaintiff to work about equally admissible?

The danger of an operator getting his hands caught in a dangerous machine, and what precautions to take to prevent it is deemed to be a subject for expert testimony.

Thompson, Negligence, Sec. 7752.
N. Y. Biscuit Co. v. Roass, 74 Fed. 608.
Peterson v. Johnson, 70 Minn. 538 (73 N. W. 510).

In *Peterson v. Johnson*, 70 Minn. 538, a case similar to the case at bar, it was said:

"Assignments of error 11 to 14, inclusive, challenge the correctness of the rulings of the Court in permitting plaintiff's witness to testify as to whether a guard could have been placed around the gearing in question, and whether it was practicable to place one there. We are of the opinion that the evidence was competent expert evidence, and whether the witness was qualified as an expert to testify as to these matters was, on the evidence, a question of fact for the trial judge."

The Court was fully warranted in not giving the jury the instructions requested by the defendant, since they not only did not state the law of the case, but, as well, did not correctly state the testimony of the plaintiff upon which defendant bases its instructions.

The language of the requested instructions would lead to the belief that the plaintiff had testified to the fact of knowledge of the danger he encountered, whereas the fact is that he testified that *he did not know of it.* He testified that he never saw cog wheels before, and did not know whether he would get hurt if he put his hands in them.

Transcript, page 27.

With respect to instruction No. 1, it is apparent that the defendant did not know that the plaintiff was experienced. It is not shown that inquiry had been made to determine the fact. It must be presumed that if inquiry had been made, proper instructions as to safeguarding himself would have been given the plaintiff. It is in evidence that the defendant believed the

plaintiff was not experienced, since, as testified by witness Savage, its foreman, steps were taken to prevent injury to the plaintiff by guarding the machinery with which he was to work within the scope of his regular employment.

Since it is not in evidence that the defendant knew the plaintiff to be experienced, it necessarily follows that the duty of the defendant was to warn and instruct him properly, and failing so to do, was negligent. There is nothing in law which excuses the negligence of a master in this regard.

In *Anderson v. Columbia Imp. Co.,* 41 Wash. 84, it is said:

"A master is *prima facie* bound to instruct a servant as to all risks which are abnormal and extraordinary and at the same time of such a kind that the servant cannot be held chargeable with an adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself. There can be no doubt but that this rule is correct."

It is the rule of the law that where there are patent defects or hazards incident to an occupation, of which the master knows or ought to know, it is his duty to warn the servant of them fully, if through youth, inexperience, or other cause, the servant is incompetent to fully *understand and appreciate* the nature and extent of the hazard.

Railroad v. Fort, 84 Ill. 17, Wall 553 (21 L. Ed. 739).
Choctaw, etc., R. Co. v. McDade, 191 U. S. 64 (48 L. Ed. 96).
Railroad Co. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
Voelker v. Railroad Co., 116 Fed. 867.
Railroad Co. v. Holloway, 52 C. C. S. 260 (114 Fed. 458).
Pierce v. Clavin, 27 C. C. A. 227 (82 Fed. 550).
Davison v. Railroad Co., 44 Fed. 476.
Bean v. Navigation Co., 24 Fed. 124.
Thompson v. Railroad Co., 18 Fed. 239.
Railroad Co. v. Linstedt, 106 C. C. A. 238.
Mather v. Rillston, 156 U. S. 391 (39 L. Ed. 464.)
Lahti v. Rothchild, 60 Wash. 438.
Dealon v. Abram, 60 Wash. 6.

Defendants instruction No. 1 was, therefore, properly refused.

With respect to the defendant's requested instructions Nos. 2, 6 and 7, "A person working with a defective or unguarded machine, without complaint, knowing of the dangers of the defect or unguarded part, and if injured thereby, cannot recover"; attention is invited to the case of *Doyle v. G. N. Ry. Co.*, 43 Wash. 563, wherein it is held:

"The true rule, as nearly as it can be stated, is that a servant can recover for an injury from defects due to the master's fault, *of which he had notice,* if under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar circumstances, have continued the same work under the same risk." Concerning the contention that no notice to the proper agents of the company was shown when there was opportunity therefor; it is sufficient to say that the engineers and conductor on the train had notice of the defects, and that it was not necessary for the fireman who was under their control to report to any other agent of the company.

And also, *Allen v. Gillman McNeil & Co.*, 127 Fed. 609, to the effect that:

"The true rule in this, as in all other cases, is that, if the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely upon the master's opinion." * * * If, therefore, he continued to incur the risks of such defects, under any kind of necessity or coercion, such as the threat or reasonable fear of his dismissal, he does not voluntarily assume the risk, and is not necessarily debarred from recovery thereby."

While the instructions might not be objectionable as a statement of the law in a case where there was *no dispute as to the knowledge of the danger from the defects or unguarded parts* on the part of the plaintiff, it probably would confuse, if not positively mislead, the jury in a case where, as in this, the *knowledge and appreciation* of the plaintiff of the danger is in dispute, and a proper question for the determination of the jury. This Court properly declined to employ the language of the defendant.

Instruction No. 3 was properly refused, for the reason that it did not limit the apparent peril to such perils and hazards as was *understood and appreciated* by the plaintiff.

Atlantic, etc., R. R. v. Lindstedt, 106 C. C. A. 238.
R. R. v. McDade, 191 U. S. 64 (48 L. Ed. 96).
R. R. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
R. R. v. Jarr, 53 Fed. 65.
R. R. v. VanPelt, 93 C. C. A. 492.
Lahti v. Rothchilds, 60 Wash. 438.
Deninger v. Co., 107 C. C. A., 127.
Butler v. Frazee, 211 U. S. 459 (53 L. Ed. 281).
Allen v. Gillman, etc., 127 Fed. 615.

In the case of *R. R. v. Lindstedt,* 106 C. C. A. 238, it is said:

"In such case, involving a neglect by the master of the primary duties imposed upon him, *it must be made to affirmatively appear that the servant not only apprehended the danger thus arising from the master's neglect, but that the particular peril or hazard was appreciated by him.*"

As to the duty of employe to disobey an order to work in a dangerous place, the case of *Talkington v. Veneer Co.,* 61 Wash. 141, says:

"There is no dispute as to the order given by the foreman; that it was given is conceded by all of the witnesses, the only dispute being as to the time that elapsed after it was given and before the mill started.

The order being given, *it was respondent's duty to promptly obey.* He knew this duty and that he was subject to the commands of the foreman."

In *Cox v. Coal Co.,* 61 Wash. 347:

"If Cox had suspicions of danger, he was not free to act upon them. He had been called by one in authority over him, and told the place was safe. *It was his duty to obey the call.*"

Instruction No. 3 is wholly unsupported in law.

Defendant's instruction No. 4 was properly withheld since it is held to be the law that an employer cannot, as a matter of law, defeat the right of an employe to recover merely because the danger encountered was apparent, if the safety and suitableness of the machinery as an appliance is in issue, and

the inexperience, lack of knowledge and failure of warning to the employe is also present.

R. R. Co. v. Linstedt, 106 C. C. A. 238.

The instruction was objectionable also in that it does not come within the rule of law as announced in *Mather v. Rillston*, 156 U. S. #91 (39 L. Ed. 464), that:

"All occupations producing risks of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body or limb it is incumbent upon the promoters thereof and the employer's of others thereon to take *all reasonable and needed precautions* to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted."

Mather v. Rillston, 156 U. S. 391 (39:464).

And it overlooks the rule as laid down in *Deator v. Abrams*, 60 Wash. 1:

"If a man goes to work in a place of open and manifest danger, *if he knows the danger attendant upon his employment*, or ought to know it in the exercise of reasonable care for his own safety, *if he appreciates the risks of danger in his position*, or ought to appreciate them in the exercise of ordinary care and observation on his part, he cannot recover even though injured while at work."

Defendant's instruction No. 5, as submitted, is open to the objection that is in error in stating that plantiff testified that he knew that if caught in them he would be injured, since plaintiff testified in answer to the direct question as to whether he knew that, 'if you put your fingers in them (the cog-wheels) when they were running you would get hurt—answer that yes or no—just answer it yes or no." "*I never knew.*"

Transcript, page 40.

And also, for the reason that when he assumed the work of oiling this machinery he did not assume the risk unless he knew of and appreciated the danger.

Doyle v. R. R. Co., 43 Wash. 563.
Allen v. Gilman, etc., 127 Fed. 609.
R. R. vs. Linstedt, 106 C. C. A. 238.
Mather v. Rillston, 156 U. S. 391 (39 L. Ed. 464).
Lahti v. Rothchild, 60 Wash. 438.
Deator v. Abrams, 60 Wash. 1.
R. R. v. McDade, 191 U. S. 64 (48 L. Ed. 96).
R. R. v. O'Brien, 161 U. S. 451 (40 L. Ed. 766).
R. R. v. Jarvi, 53 Fed. 65.
R. R. v. Van Pelt, 93 C. C. A. 492.

Regarding instruction No. 8, it may be said that the same principles were no less cogently stated by the Court in its instruction, "that persons and companies in industrial enterprises where machinery and dangerous appliances are employed have a right to employ workmen to assist in carrying on the work, and an employe who enters upon such employment is by the law charged with the assumption of the risks of the employment, and I mean by that the necessary dangers that are incident to the use of the machinery and the dangerous appliances, to him, the person working around and with them. Now, the employe who voluntarily enters upon that kind of employment is charged with the assumption of the risk of dangers that are necessarily and ordinarily incident to the employment, and in addition to that those dangers which are obvious so that they must be observed by an employe who is exercising care, and observant to avoid danger. The obvious dangers are assumed by the employe, and in addition to that any other dangers that are incident to the employment of which he has actual knowledge. The employe is not required by the law to assume the risk of dangers which are concealed and which he does not know of—he is not required to search for dangers, but he is required to be alert and vigilant to observe when they are fully exposed. If a man is injured as a consequence of exposing himself to contact with operating machinery that is dangerous and the dangers are visible and

such that a person of ordinary intelligence would see and appreciate, it would afford him no ground for a claim for damages against his employer if he gets hurt by them."

Then, error for refusal to charge in certain language cannot be assigned where the same idea is set forth in different language and equally as well understood by the jury.

The opinion in *Hall v. Lumber Co.*, 61 Wash. 355, says:

"As we have often said, it is not necessary that the Court give to the jury a requested instruction in the language in which it is presented; it is sufficient if the instruction is given in substance."

"Courts are not bound to give instructions upon specific requests by counsel for them. If the Courts charge the jury rightly upon the case generally, it has done all that it ought to do."

Mills v. Smith, 8 Wall 27 (19 L. Ed. 346).

"The Court may reject the language of the request."

R. R. v. Cody, 166 U. S. 606 (41 L. Ed. 1132).
Co. v. Chessman, 116 U. S. 528 (29 L. Ed. 712).

Defendant's requested instruction No. 9 is too broad, and is not limited to the established rule of the law.

It is held that an employe "*is not charged with contributory negligence simply because he sees and knows the defects*, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which these defects indicate."

The dangers and defects merely must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence."

R. R. Co. v. Jarvi, 53 Fed. Rep. 65, C. C. A. 433, cited in 18 subsequent cases.

Allen v. Gilman, 127 Fed. 609, says:

"The mere fact that the employe *knows* that there is danger will not defeat his right to recover if in obeying he acted with ordinary care under the circumstances."

And in *Cook v. Lumber Co.*, 61 Wash. 122, it is said, that an employe is to be held guilty of negligence because,

"He, as men of ordinary understanding and common prudence will do at times, obeyed the impulse of his mind to reach over and clear the chain."

With respect to defendant's objection to the charge of the Court to the jury, as specified in paragraph 10 of its motion, no error was committed in leaving to the jury the determination of whether or not the defendant had furnished a safe place in which for the plaintiff to work. It was a question of fact, going to the negligence of the defendant, and as such, was for the jury, under the ruling of the U. S. S. C. in *Davidson v. S. S. Co.*, 205 U. S. 187 (51-764), wherein it is said:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by the jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair minded men will honestly draw different conclusions from them."

Sioux City v. Stonp, 17 Wall 657 (21 L. Ed. 745).
R. R. v. McDade, 135 U. S. 554 (34 L. Ed. 235).
R. R. v. Converse, 139 U. S. 469 (35 L. Ed. 213).

From these authorities, and many more, of a kindred nature could be cited, it is obvious that the question for us to consider is whether there was testimony from which the jury might rightfully find the defendant guilty of negligence."

Also *Clow & Sons, v. Holtz*, 34 C. C. A. 550 (92 Fed. 572).
Cox v. Coal Co., 61 Wash. 347.
R. R. v. Linstedt, 106 C. C. A. 238.

Whether or not the plaintiff assumed the risk, or waived the doctrine of "safe place" was properly for the jury, with proper instructions from the Court, which instruction was rightly given.

Transcript, page 112.

Relative to the objection as set forth in paragraph 12 of the motion, attention is directed to the opinion in *R. R. Co. v. Cumberland*, 176 U. S. 232 (44 L. Ed. 447):

"In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent physical or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger. * * * The plaintiff is liable only for the proper use of his own faculties, and what may be justly held to be contributory negligence in one is not necessarily such in another."

In view of the law as set forth herein, and the facts in the case at bar, the plaintiff submits that the motion now under consideration should be denied.

HERBERT W. MEYERS,
CHARLES A. ENSLOW.

Filed U. S. Circuit Court. Western District of Washington, Oct. 25, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,*
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*
No. 1934.

PLAINTIFF'S BRIEF ON WORD "ANY" USED IN INSTRUCTION AND ON SUFFICIENCY OF PLEADINGS.

Upon the argument of the motion for judgment *non obstante veredicto* and for new trial, the Court withheld its decision pending a showing by the plaintiff that the instruction as given to the jury, that:

"If you find from the evidence that the injuries occurred by reason of *any negligence* on the part of the defendant company, then the plaintiff is entitled to recover, unless it affirmatively appears by the preponderance of evidence on that point that he was himself guilty of such negligence as to be the proximate cause of the injuries he suffered."

was not prejudicial to the defendent by reason of the use of the words "any negligence." This raises the question of the ambiguity of the instruction, in that it questions the real meaning of it, as well as the effect of it upon the jury.

It is especially called to the attention of the Court that the correctness of this instruction was not challenged, nor any exception to it noted at the time it was given by the Court; but that it is now raised by the Court, on its own initiative, after trial and verdict for the plaintiff. No exception was noted to it by the defendant.

It is submitted, that, whatever action the Court may take, the defendant cannot now be permitted to have the advantage of an exception *other than such as he noted at the trial*, in view of the rule which obtains in both the Federal and the State practice.

In *Improvement Company v. Munson*, 14 Wall, 442 (20 L. Ed. 872), it is stated to be the rule that:

"If the charge is merely ambiguous, the party dissatisfied with it should have requested to have it made clear *before the jury left the bar;* that a party under such circumstances may not acquiesce in the correctness of the instruction by his silence and take his chance with the jury, and then be allowed, after verdict is given against him, to claim the benefit of the ambiguity without having invited attention to the subject and given the Court an opportunity to have made the correction to the jury."

It is held that instructions given by the Court at the trial are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies *not pointed out by the excepting party.*

Congress Springs Company v. Edgar, 99 U. S. 645 (25 L. Ed. 487), holds:

"In examining the charge of the Court, for the purpose of ascertaining its correctness in point of law, *the whole scope* and bearing of it must be taken together. It is wholly inadmissible to take up a *single and detached passages* and decide upon them, without attending to the context or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions.

Maynac v. Thompson, 7 Peters 348.

Instructions given by the Court at the trial are entitled to a reasonable interpretation, and if the *proposition* as stated is not erroneous, they are not, as a general rule, to be regarded as incorrect on account of omissions or deficiencies *not pointed* out by the excepting party.

Castle v. Bullard, 23 Howard 172 (16 L. Ed. 424).

Appellate Courts are not inclined to grant a new trial on account of an ambiguity in the charge to the jury, *where it appears that the complaining party made no effort at the trial to have the matter explained.*

Locke v. U. S., 2 Cliff. 574.
Smith v. McNamara, 4 Lans. 169.

Requests for such purpose may be made *at the close of the charge* to call attention of the judge to the supposed error, inaccuracy or ambiguity of expression; *and where nothing of the kind is done, the judgment will not be reversed,* unless the Court is of the opinion that the jury were misled or wrongfully directed.

Carver v. Jackson, 4 Peters 1.
White v. McLean, 57 N. Y. 670.

And, in *Pacific Express Company v. Milan, et al.,* 132 U. S. 531 (33 L. Ed. 450):

"While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken *before the jury withdrew from the bar.*"

Thiede v. Utah, 159 U. S. 531 (40 L. Ed. 237).
United States v. Carey, 110 U. S. 81 (28 L. Ed. 67).
Phelps v. Mayer, 15 Howard 160.

Stanton v. Embry, 93 U. S. 555.
Hunnicutt v. Peyton, 102 U. S. 354.

In the case of *Michigan Insurance Bank v. Eldred*, 143 U. S. 293 (36 L. Ed. 162), the Supreme Court of the United States said:

"By the uniform course of decisions, no exception to rulings at a trial can be considered by this Court unless they were taken at the trial."

And the Court says further, in the same opinion:

"The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the Court; the trial Court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth."

Such is the rule of the Federal Courts.

The defendant here did not offer objection nor note exception to any instruction other than that relating to the measure of damages, and cannot now have the advantage of any other exception, under the rule of the Supreme Court of the State of Washington, as announced in the case of *Coffey v. Seattle Electric Company*, 59 Wash. 686, where it is said:

"They must still be taken by stating the same to the trial judge, and by him noted in the minutes of the court or embodied in the record of the cause by the stenographer taking such record. *Otherwise they are not proper exceptions and of no value to a litigant, either in the court below or here.* Such is unquestionably the rule."

And, in *Gerber v. Aetna Indemnity Company*, 61 Wash. 184:

"We cannot hold, when during the argument upon a legal contention counsel indicates to the Court his contention that the Court is about to make an erroneous ruling, that such expression of counsel's views will operate as, and take the place of, an exception to the ruling. Exceptions, and the manner of taking them, are controlled by statute, and before beneficial the statutory requirement must be followed."

Since the defendant has no right to question the correctness of the instruction which has been called in question by

the Court, and cannot take advantage of it on appeal to the Circuit Court of Appeals, the Court should not require the plaintiff to defend the correctness of the instruction, unless it be for the reason that the Court itself believes the jury were misled or wrongfully instructed, to the extent of prejudicing the right of the defendant.

When the Court itself, the attorneys for the plaintiff, who earnestly desired that no erroneous instruction be given, and the astute counsel for the defense, who is so experienced in detecting defects in all pleadings and instructions, did not notice the small word "any" in the instruction given; and when the Supreme Court of the United States have reversed a case from the Circuit Court of Appeals of the Ninth Circuit, and in doing so commended an instruction embodying the same word in a relation to other words so as to make it far more objectionable than as the word was used here, can it be said that the jury in this case seized upon that word and acted upon it, and thereby prejudiced the defendant in any manner?

In the opinion in *Railroad Company v. Poinier*, 167 U. S. 48 (42 L. Ed. 72), to which reference is made next above, it is said:

"Accordingly we think that the defendant was entitled to have had the following instruction given to the jury: 'If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train in following the first train too closely, or by not keeping the extra train in proper control, *or by any other act or neglect* of the engineer or conductor of the first train, then I instruct you that the defendants are not liable, and you should return a verdict for the defendants."

This case indicates that the Supreme Court of the United States did not place such a refinement upon the use of language as is sought to be placed upon it here, and had no reason to believe that the other party in the action would be prejudiced by the use of the words "any neglect."

A case directly in point, and absolutely on all fours with the case at bar, will be found in 61 Wash. 213, styled *Starck v. Washington Union Coal Co.*, wherein it says:

"Instruction No. 16, given by the Court, was as follows: 'You are instructed that one of the defenses set forth in the answer is that the dangers of the working place where plaintiff claims to have been injured were open and apparent to him, and that by working in said place he assumed the risk thereof. I instruct you that if you find from the evidence that defendant performed its statutory duty, as hereinbefore defined, to you in these instructions, and was not guilty of *any negligence,* and that there still remained a peril and risk to the plaintiff, at said working place, and that the same was open and apparent to plaintiff or known to him, or that he had such notice thereof that a man of ordinary prudence under like circumstances would have discovered such danger, then plaintiff did assume the risks of such danger, and if he was thereby injured he has no redress; but if you find from the evidence that the danger to the plaintiff at said working place, if any, was caused by the neglect of the defendant to perform its said statutory duty, if it did fail to perform the statutory duty, and that it was by reason of such negligence that plaintiff was injured, if he was injured, then you are instructed that plaintiff did not assume the risk of injury through such neglect.'

It seems to us that the appellant's rights were guarded in an exceedingly liberal manner in this instruction, and that the only objection that can be raised to it is the *very technical* objection as to the use of the word 'any' in the early part of the instruction. It is contended by the appellant that there was no other negligence than the negligence of neglecting to perform its statutory duty in relation to the furnishing of props, and that under the instruction the Court authorized the jury to consider the question whether the appellant had been guilty of some other negligence, thereby authorizing the jury to take into consideration a fact that was not in the pleadings, and particularly not in the evidence; and that the instruction was therefore erroneous.

But we think this is too narrow a construction to place upon this instruction. There was probably an unfortunate use of the word 'any,' but we think the jury well understood when the Court said: 'I instruct you if you find from the evidence

that the defendant performed its statutory duty as hereinbefore defined to you in these instructions, and was not guilty of any negligence,' that the Court had reference not to any other negligence, but any negligence in not performing its statutory duty as thereinbefore defined.

If judgment were reversed for every little mistake made in the use of language by courts while instructing juries, the wheels of justice would be effectually blocked."

Whether or not the reasoning of this case would appeal to the Circuit Court of Appeals of the Ninth Circuit cannot be stated until it is presented to them squarely, but that it would meet with approval of those judges of law and equity can hardly be doubted, since it is so well grounded upon the principles of ordinary justice.

In another case in the Supreme Court of Illinois, *Railroad Company v. Musa*, reported in 54 Northwestern Reporter 168, the Court had the same proposition before it, and used this language

"The complaint that the first and second instructions on behalf of the appellee authorized the jury to find for the appellee if they believed from the evidence that the servants of the appellant company were guilty of *any negligence*, without restricting the right of recovery to the negligence charged in the declaration, would not be without force, if negligence other than that charged in the declaration had in any way been disclosed to the jury. The facts made to appear by proof did not tend to establish or raise a presumption that the servants of the company had been derelict otherwise than as alleged in the declaration. * * * Moreover, the jury were distinctly advised in other instructions that it was essential to a right of recovery that the evidence should show that the appellant company was guilty of negligence as charged in the declaration."

The Court of Civil Appeals of the State of Texas passed upon the same question in *Railroad Company v. Burns*, 91 Southwestern Reporter 618, and said:

"The sixth assignment complains of the following paragraph of the charge: 'If you believe from the evidence that the plaintiff was guilty of *any negligence*, which caused or contributed to his injury, if any, then he cannot recover.' This is said

to be an incomplete statement of the rule, and not accurate, in this: That the rule of contributory negligence calls for more; that is to say, if plaintiff omitted anything which an ordinarily prudent person would have done to prevent the accident, he would not be allowed to recover. * * * *There is no force whatever in the criticism of the charge. It stated the rule sufficiently.* The charge elsewhere gave a correct definition of negligence and also ordinary care."

The Supreme Court of Kansas, in construing a statute of that state in which the words "any negligence" occurred, in the case of *Railroad Company v. Brown*, 24 Pacific Reporter 497, said:

"The statute relied on by the plaintiff uses the words 'any negligence,' and, in so using the same, it undoubtedly means any culpable negligence, or any negligence above what is permissible. Or, in other words, it means a want of that degree of care required *in the particular instance*."

The Court of Civil Appeals of Texas, in *Taylor v. Warner*, 60 Southwestern Reporter 442, passed upon the use of the words, and said:

"The eighth and ninth assignments of error complain of the use of the word 'any' instead of 'a' in defining negligence and care and diligence, as 'any reasonably prudent man' instead of 'a reasonably prudent man'; that it imposes a higher degree of care upon the defendant than the law warrants. We do not think the distinction well made."

Since judges learned in the law, and with the matter pointed out and distinctly before them, are unanimous in the declaration that the use of the words "any negligence" is not misleading or prejudicial, it is preposterous to suppose that a jury, hearing the words among hundreds of others no less important, would single them out and give to them a wrong meaning.

The Supreme Court of the United States, in *Standard Oil Company v. Brown*, 218 U. S. 78 (54 L. Ed. 939), has well stated the probable action of the jury in cases where the distinguishing of the meaning of similar words is left to them in instructions, the case referring to the substitution of the word "would" for "could" by the Court, wherein it says:

"But little comment is needed on the contention that there is reversible error in the action of the Court.

It would be going very far to reverse the judgment on the *supposition* that the jury would have seen a different meaning in the word 'could' than they saw in the word 'would,' and in consequence would have imputed a greater knowledge to the defendant in error of the risks of his employment."

The action of the Court in this present case, should it hold that the jury were influenced to the prejudice of the defendant by the use of the word "any" must be taken purely upon the *supposition*, unsupported by evidence, that the jury were so influenced, and we submit that the ends of justice do not require the granting of the motion of the defendant upon a mere supposition entirely unsupported by any fact.

The entire charge of the Court tends to bring the minds of the jury to the appreciation of the fact that the decision must be made upon the evidence before them, and not upon extraneous matters; and the sentence next preceding the one now in question refers specifically to the facts "from which the jury will judge as to whether there was negligence or not," and then the jury are told in the same sentence in which "any negligence" occurs that there must be "*a preponderance of the evidence on that point.*" To hold that they did not comprehend the meaning of the words would be to impeach the intelligence of the jury. There is nothing in the entire charge which has a tendency to take the minds of the jury away from the facts shown by the evidence to be in issue in the case, and there is nothing in evidence over the objection of defendant with exception noted.

Instructions are to be given a reasonable interpretation, and are to be construed as a whole, and this rule obtains in both the State and Federal practice. In support of this statement reference is made to the case of *Spring Company v. Edgar*, cited and quoted on page 1 of this brief, in addition to which the Supreme Court of the United States, in *Magniac v. Thomson*, 7 Peters 348 (8 L. Ed. 709), says:

"The question now before the court is, whether the charge to the jury in the Circuit Court contains any erroneous statements of the law; in examining it, for the purpose of ascertain-

ing its correctness, the whole scope and bearing of it must be taken together; it is wholly inadmissible, to take up single and detached passages, and to decide upon them, without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge; the whole is to be construed as it must have been understood, both by the Court and the jury, at the time it was delivered."

And in *Evanston v. Gunn*, 99 U. S. 660 (25 L. Ed. 306), it is held that where the charge to the jury taken as a whole fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection need qualification.

Railroad v. Holloway, 191 U. S. 334 (48 L. Ed. 207).
Bird v. U. S., 187 U. S. 118 (47 L. Ed. 1175).

The Supreme Court of the State of Washington announced the rule in the case of *Roberts v. Mill Company*, 30 Wash. 25, thus:

"*The whole instruction must be construed together.* So construed, it was not error. It is true that this sentence is not technically correct; but this error is not of moment, especially when the intent of the whole is clearly expressed that the burden is upon the plaintiff to prove negligence. This Court has frequently held that where an isolated portion of an instruction standing alone may be technically erroneous, yet if the whole instruction, taken together, fairly stated the law, it will be upheld."

Company v. Seattle, 6. Wash. 101.
Duggan v. Company, 6. Wash. 593.
McQuillan v. Seattle, 13 Wash. 600.
State v. Surry, 23 Wash. 246.
Miller v. Dumond, 24 Wash. 648.

When taken as a whole, the instructions given in this case are clearly not such as can properly be said to in any way prejudice the rights of the defendant in any way.

That they must have been so considered by the defendant is evidenced by the fact of its failure to note exception to them at the time of the trial. It should not now be heard to com-

plain of them. It cannot take advantage of the defect complained of, upon appeal.

In a supplemental brief, the defendant challenges the sufficiency of the complaint, and points out that the sole ground of negligence alleged in the complaint is:

"That the carelessness and negligence aforesaid consists of failing to provide and maintain reasonable safe guards for the aforesaid cogs, shafts and gearing,"

and it is objected that the Court submitted the case to the jury upon the theory that it was the duty of the defendant to have furnished the plaintiff a safe place in which to work, but that it is not alleged in the complaint that the place furnished the plaintiff was unsafe.

Undoubtedly, this objection is more to the form than to the substance of the complaint, since, in paragraph IV of the complaint, it is alleged that:

"The defendant, on or about the said date, and prior thereto, failed and neglected to provide reasonable guards for the said cogs and gears, and at the time of said accident to plaintiff the said cogs and gears were wholly unprotected."

It is submitted that this paragraph sufficiently alleges the fact that the place in which the plaintiff was directed to work when the injury to him occurred, without another allegation in specific words, and that the facts alleged are ample upon which to found the conclusion of law that the place was unsafe.

An examination of the record in this case will disclose the fact that no objection was made to the sufficiency of the complaint to support proof of the unsafe condition of the place; that no objection was made or exception noted to the admission of evidence upon that point; that no motion to strike or exclude such evidence was made, and it is submitted that, after verdict, the defendant cannot be heard to question the sufficiency of the complaint in that regard.

The Circuit Court of Appeals, Ninth Circuit, in the case of *Shea v. Nilima*, 133 Fed. 209, said with respect to the sufficiency of the allegations in a complaint:

"The true doctrine to be gathered from all the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by rea-

sonable intendment from the matters which are set forth, although the allegations of the facts are imperfect, incomplete, and defective—such insufficiency pertaining, however, to form rather than to the substance—the proper mode of correction is not by demurrer, nor by excluding the evidence at the trial, but by motion before trial to make the averments more definite and certain by amendment. * * * Instead of alleging issuable facts, the pleader should state the evidence of such facts, or even a portion thereof only, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law in place of facts, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by motion, and not by demurrer."

Thompson, in his work on Negligence, S 7527, says:

"The complaint for injuries caused by a failure of the master to furnish a safe place to work should set out the facts showing wherein the danger consisted and the casual connection between the defective place and the injury."

Lanter v. Duckworth, 19 Ind. App. 535 (48 L. Ed. 86).
Preston v. Railroad, 84 Ga. 588 (11 S. E. 143).

Hence, it would seem unnecessary to allege in specific words the fact that it was the duty of the master to furnish a safe place for employes, since that is a conclusion of law which arises from the statement of the necessary facts from which it may be inferred in a given instance.

In *Walla Walla v. Water Company*, 172 U. S. 1 (43 L. Ed. 341), it is said:

"That which is patent to anyone of average understanding need not be particularly averred."

And it is a general rule that facts, not legal conclusions, should be alleged in pleadings.

Cambers v. Bank, 156 Fed. 482 (84 C. C. A. 292).
Company v. Barnett, 144 Fed. 338 (75 C. C. A. 300).

In *Alabama v. Burr*, 115 U. S. 413 (29 L. Ed. 435), the United States Supreme Court said:

"Pleadings must state facts, and not conclusions of law merely. If the facts from which the conclusion is drawn are

not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad."

The Supreme Court of Washington, in *Harris v. Halverson*, 23 Wash. 782, says:

"The true doctrine is that every reasonable intendment and presumption is to be made in favor of the pleading, and if the substantial facts which constitute a cause of action are stated in the complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of the facts are conclusions of law, or otherwise imperfect, incomplete and defective, such insufficiency pertaining to the form rather than to the substance, the proper mode of correction is not by demurrer, nor by excluding the evidence at the trial, but by motion before the trial to make the averments more definite and certain by amendment."

following the Circuit Court of Appeals in *Shea v. Nilima, supra.*

Not only will the Court give full effect to the intendments of the pleader as indicated by the allegations of the complaint, but, as stated in *Collins v. Denny Clay Company*, 41 Wash. 136, the complaint will be considered amended to conform to the facts proved:

"Objection is made to the sufficiency of the complaint to sustain the judgment, as rendered against some of the appellants, but the proofs were received without objection, and the Court will consider the complaint amended, if need be, to conform to the facts proved."

In *Meade v. Murray*, 5 Wash. 693, it is held:

"The Court, on motion for a non suit, ought to consider the complaint amended to correspond to the facts proved, where there is a variance between the proof and the complaint, and the proof has been received without objection."

In *State v. Indemnity Association*, 18 Wash. 514:

"A motion for a non suit on the ground that the complaint failed to state a cause of action was properly denied, where there was no demurrer and the defect had been cured by the admission of proof without objection."

In *Cribben v. Callaghan*, 156 Illinois 549 (41 N. E. 179), this language is used:

"After verdict, on a motion in arrest of judgment, the Court will intend that every material fact alleged in the declaration, or fairly inferable from what is alleged, was proved on the trial. After verdict, judgment will not be arrested for any defect in the declaration which, by reasonable intendment, must be considered to have been proved, or where the requisite allegation may be considered as part of what is already alleged in the declaration.

Morey v. Homan, 10 Vt. 565, and other cases in note A to 2 Tidd, Prac., p. 919.

Where the plaintiff states his cause of action defectively, it will be presumed after verdict that all circumstances necessary, in form or substance, to complete the title so defectively stated, were proved at the trial, as they must have been proved in order to entitle the plaintiff to recover. 2 Tidd, Prac. p. 919. * * * But while we have discussed the case as though the allegation of duty was a material one, it is to be remembered that really it is unnecessary to allege that a certain act or line of conduct is a duty, because the law implies the duty from the facts stated. A conclusion of law need not be pleaded.

Railway v. Coit, 50 Ill. App. 640."

An allegation of duty in words in an action for negligence is always surplusage, since, if the facts stated raise the duty, the allegation is unnecessary; if they do not, it is unavailing.

Matz v. Railway Co., 88 Fed. 770.
Chicago v. Apel, 50 Ill. App. 132.
Clyne v. Helmes, 61 N. J. L. 358 (39 Atl. 767).
Sammin v. Wilhelm, 6 Ohio C. C. 565.
Hewson v. New Haven, 34 Conn. 136 (91 Am. Dec. 718).
Railway Co. v. Burton, 97 Ala. 240 (12 So. 88).

In the case of *Nashua Savings Bank v. Company*, 189 U. S. 221 (47 L. Ed. 786), the Supreme Court said with respect to an alleged insufficient complaint:

"The trial proceeded under the third count of the declaration, which was in *indebitatus assumpsit, and no objection was made to the evidence offered on the ground of variance.* Under such circumstances, and without expressing an opinion as to the

admissibility of the evidence offered, *the declaration is good after verdict.* In *Roberts v. Graham*, 6 Wallace 578 (18 L. Ed. 791), we held that variances between allegations and proof must be taken when the evidence is offered, and if the evidence be sufficient to support the verdict *the defect in the declaration is cured.*

Patrick v. Graham, 132 U. S. 627 (33 L. Ed. 460)."

In *Bonne v. Company*, 35 Washington 696, the Court, in the opinion, said with respect to objection to pleading:

"At the trial when the respondents commenced the introduction of evidence it for the first time made the objection. This, as we have repeatedly held, was too late to take advantage of any technical defect in the complaint; there must be a defect in substance, incapable of being cured by amendment, before courts will hold the complaint bad when the objection is raised on the trial for the first time. * * * At most they are but technical defects and omissions which can be cured by amendment, and will now, inasmuch as they were not suggested in time, *be deemed corrected by amendment.*"

Having shown that the defendant is without right in law to object at this time to the sufficiency of the complaint, as well as to the instructions, other than as objected to in time, and that reasonable minds have not been impressed with the fact that the use of the words "any negligence" in any manner prejudices the rights of litigants, we submit that the motion for judgment *non obstante* and for a new trial should be denied.

Oct. 30, 1911.

HERBERT W. MEYERS,
CHARLES A. ENSLOW,
Attorneys for Plaintiff.

Indorsed: Plaintiff's Brief on word "any" used in instruction and on sufficiency of pleading. Filed U. S. Circuit Court, Western District of Washington, Oct. 30, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Appellant,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Respondent.
No. 1934.

SUPPLEMENTAL BRIEF OF RESPONDENT.

As pointed out in the argument on motion for new trial, the sole ground of negligence alleged in the complaint is found in Paragraph VI in the following language:

"That the carelessness and negligence aforesaid consisted in failing to provide and maintain reasonable safe-guards for the aforesaid cogs, shafts and gearing."

This Court submitted the case to the jury upon the theory that it was the duty of the defendant to have furnished the plaintiff a safe place in which to work, Your Honor stating as follows:

"Failure to exercise due care to make the place *and the surroundings* reasonably safe for employes is a negligence of duty which is a legal wrong and when an injury is suffered in consequence of that kind of wrong, the employer is liable on the principle of rendering compensation for an injury suffered in consequence of his wrongful conduct."

Again Your Honor stated:

"If you find from the evidence that the injuries occurred by reason of *any* negligence on the part of the defendant company, then the plaintiff is entitled to recover, unless it affirmatively appears that he was guilty of contributory negligence," etc.

Your Honor will remember that in the trial of the case the plaintiff was permitted, over defendant's objection, (S. F. p. 7) to show that he was not warned of the danger, the question propounded being:

"Q. What were you told, if anything, about the motor or gravel machine when you went to work on the motor?

Objected to. Objection overruled.

"A. They told him nothing about the gravel machine, just told him to go to work on the motor."

The Court will remember that it was strenuously contended in the argument that the platform upon which plaintiff stood in oiling the machinery was exceedingly narrow and that it was elevated above the surface of the ground, and that the structure itself was elevated and a difficult place for employes to work from. The question of surroundings, which the Court instructed the jury it was the duty of the employer to make reasonably safe was not an issue in the case at all. It is not even alleged that the place furnished the plaintiff was an unsafe place in which to perform his work, and if the allegations of the complaint are broad enough to involve the doctrine "Safe Place," it is involved only in the proposition that the cogs themselves were not guarded and not in the idea that the surroundings of the cogs were in any manner defective or unsafe. The expression used in the Court's instruction

"If you find from the evidence that the injury occurred by reason of *any* negligence"

must necessarily have left to the jury to determine at their own whim whether the structure itself, the platform or the surroundings were, in any manner, unsafe. The plaintiff was engaged with others in constructing a foundation for a power house in the canon at Snoqualmie Falls and this structure was located on the steep side of the canon. The gravel was elevated to the washing machine by means of tramroads with a steep grade, and when washed passed down a chute to the foundation that was being installed.

The whole equipment was a purely temporary one used in the construction of this power house foundation and was in no sense a permanent piece of machinery. Under the issues the sole question, if it was a question, to go to the jury was related solely to the cog-wheels, not to the surroundings. The Court's instruction permitted the jury to go outside of the issues to base its verdict upon anything. The jury may have found in the conduct of the defendant, or in the character of the super-

structure, or the place where the plaintiff was required to go something it would deem to have been an improper or unsafe construction. In *Panton v. Ballard*, 24 Tex. 620, the Court holds that a judgment must be reversed if the jury may have been misled by the charge, although there were grounds at issue upon which the verdict might have been based.

In *Williams v. Conger*, 49 Tex. 493, it is held that a judgment will be reversed where an improper issue has been submitted to the jury and where it cannot be seen from the record that the jury may have found a verdict on such issue, although the verdict in the law and testimony was correctly found upon the merits. In *Sabin v. Cameron*, 117 N. W. 95, the Court says:

"The rule is well established in this court that it is prejudicial error to submit to the jury an issue not raised by the pleadings or evidence."

In *Hudson v. Morris*, 55 Tex. 595, the Court said:

"Where the action of the Court in instructing the jury is clearly erroneous and calculated to mislead the jury to a wrong result to the injury of the party, in order to sustain the judgment which follows it, it ought to be clear that such a consequence did not in fact ensue from the error."

To the same effect is the case of *Railroad Company v. Greenlea*, 62 Tex. 345. In *Perro v. Cooper*, 28 Pac. 391, it is held that an instruction, even though correct as a proposition of law, is misleading as to the issues, inapplicable to the evidence and calculated to prejudice the rights of the losing party, cannot be held to be harmless error.

The only legal wrong alleged was the failure to guard the cog-wheels and no complaint is made of the surroundings, or of the superstructure, or of the platform. If the Court is right in assuming that the question at issue was the mixed question of law and fact, the issue pertains solely to the guarding of the cog-wheels, and the Court should not have left it to the whim of the jury to have concluded from the testimony and an examination of the exhibits; and, considering the nature of the structure, the place of its location, means of access to it, that the plan and character of the structure itself was not reasonably safe—certainly under the general instruction that if the jury should find that the plaintiff was injured by reason of

any negligence the jury was given free scope to find the verdict for the plaintiff, regardless of the Court's instructions as to assumed risk and contributory negligence in the light of undisputed testimony that the plaintiff himself knew and fully understood the risk.

The Court will remember that it was contended in argument that the plaintiff had had no experience in working about machinery; that he did not understand the English language, and that he was an inexperienced foreigner. Complaint was made that he had not been instructed as to the dangers of oiling this machinery. Your Honor stated in the instructions as follows:

"You should require him to exercise only such faculties and capacities as he is endowed with by nature for the avoidance of danger."

Again:

"The law does, as I have stated, impose upon him only the degree of vigilance that a person of his natural capacity considering his age, his experience and his brightness of intellect and everything of that kind is to be taken into account and he is chargeable with the consequences of those dangers that would necessarily be apparent to him—to a man of his capacities."

Under the general instruction permitting the jury to find defendant guilty if they found it was guilty of any negligence, the jury may well have concluded that on account of this man's lack of experience he should have been warned. There was no issue of that kind in the complaint. Again, the complaint is directed solely to the cog-wheels and is accordingly a complaint of the condition of an appliance and not of place, and in the Court's instructions, in referring to "Safe Place" the jury were instructed that it was the duty of the master to have safe appliances and a safe place to work.

Respectfully submitted,

KERR & McCORD,

Attorneys for Respondent.

Indorsed: Supplemental Brief of Respondent. Filed U. S. Circuit Court, Western District of Washington, Oct. 30, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Order.

This matter coming on the 1st day of November, 1911, on the request of counsel for plaintiff, and the Court believing that counsel for plaintiff should be heard further in the matter of the Court's decision on the motion for new trial as filed by Kerr & McCord, for defendants,

IT IS ORDERED, ADJUDGED AND DECREED that a rehearing be had on said motion for new trial and that counsel for plaintiff be heard on said motion on November 6th, 1911.

DONE IN OPEN COURT this 1st day of November, 1911.

C. H. HANFORD, Judge.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

PETITION FOR REHEARING.

To the Honorable Cornelius H. Hanford, Judge of the United States Circuit Court for the Western District of Washington, Northern Division:

The petitioner, Herbert W. Meyers, attorney for plaintiff, respectfully represents to the Court, and asks for a rehearing on

the matter of the Court's ruling on defendant's motion for a new trial heard on October 30, 1911, on the following grounds:

I.

The Court should not have heard the defendant nor have permitted him to file a brief on any subject except the use of the word "any" in the Court's instructions.

On October 23, 1911, the Court, after stating that he would not grant a new trial on any of the grounds mentioned and after attorney for defendant had finished his argument, addressed counsel for plaintiff as follows: "Mr. Meyers, I do not wish to hear from you on any subject except the use of the word 'any.' I believe I erred in giving an instruction containing that word, and it is for you to show me that it is not error to use that word in that way." "The Court did, however, instruct the jury it was not for negligence in general that defendant would be held. I believe the instruction contained an error which I did not catch at the time. The instruction was, "if you find from the evidence that the injuries occurred by reason of any negligence." When the reporter showed me a copy of the charge, I marked out 'any,' thinking that I did not say that, but on reading the charge requested by the defendant, I found the word 'any.' On this point that I have indicated, that where the instructions are inconsistent, whether the verdict can be sustained————, but where the case is left to the jury to find out in their own way which is error and which is correct, an erroneous instruction is reversible error. I would not be willing to grant this motion if the records showed that the case had been submitted to the jury upon *instructions which were not in error.*"

II.

The Court should not have considered any other matter except the use of the word "any" in ruling on the motion for new trial.

Counsel for plaintiff took the Court's statement that the word "any" was the only error which he saw which might be reversible.

III.

The Court should not have taken into consideration any matters on which the plaintiff was not heard and should not have been influenced by any matters which were not open for consideration under the Court's previous ruling.

IV.

The Court should not have allowed counsel for defendant to bring matters of pleading up after verdict, after stating that nothing was in issue except the use of the word "any."

V.

The Court should not have allowed defendant to be heard on the matter of instructions given by the Court which were not objected to by counsel for defendant at the time of trial, and which cannot be objected to after verdict unless such objection has been taken.

VI.

The Court should not have been influenced by the amount of the verdict, after telling counsel that the use of the word "any" was probable error and that was the only ground upon which he would grant a new trial.

VII.

The Court should not have considered the matter of excessive verdict without having given plaintiff an opportunity to be heard, and then, if the matter of an excessive verdict was in any way considered, the same should have been reduced by the Court in accordance with the Court's opinion as to what an adequate compensation for the injuries suffered would have been.

These matters, and others pertinent thereto, the petitioner respectfully prays may receive the consideration of this honorable court in conjunction with his brief hereinbefore filed on the subject of the use of the word "any" and the pleadings, and for that purpose your petitioner asks that a rehearing be granted and that said order be stayed or set aside, pending the hearing under this petition.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

Herbert W. Meyers, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition; that he has read the said petition, knows the contents thereof, and the same is true as he verily believes.

HERBERT W. MEYERS.

Subscribed and sworn to before me this 1st day of November, 1911.

(Seal) H. BALLINGER,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Order for Rehearing of Motion for New Trial. Filed U. S. Circuit Court, Western District of Washington, Nov. 1, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Appellant,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Respondent.*	No. 1934. Order.

This cause coming on to be heard on the motion of Kerr & McCord, attorneys for the defendant, for judgment notwithstanding the verdict and in the alternative for a new trial, Herbert W. Meyers appearing as counsel for the plaintiff, and Kerr & McCord as counsel for the defendant, said cause was argued to the Court on to-wit, the 23rd day of October, 1911, and by the Court taken under advisement, and now, to-wit, on this 30th day of October, A. D. 1911, the Court, having consid-

ered the argument of counsel and the briefs filed in said cause, and being now well and sufficiently advised in the premises, does hereby

ORDER, ADJUDGE and DECREE that the defendant's motion for judgment notwithstanding the verdict be and the same is hereby overruled.

It is by the Court further ORDERED, ADJUDGED and DECREED that the defendant's motion for a new trial be and the same is hereby granted and the judgment hereby entered on the verdict herein is hereby set aside and held for naught, to which ruling of the Court counsel for plaintiff duly excepts, and the exception is duly allowed.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Nov. 6, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

SUPPLEMENTAL BRIEF OF PLAINTIFF.

OBJECTION OF DEFENDANT TOO LATE.

The Court, by referring to plaintiff's brief, will see that the objections made by defendant came too late. United States Supreme Court cases and late cases from the Ninth and other circuits, as well as late cases from the State of Washington, will be found, indicating that objections to instructions cannot

be made after verdict if said instructions were not objected to at the time of trial. It will also be noted that objections to pleadings come too late when made after verdict, and it will likewise be noted that if there is a slight discrepancy between the proof and the pleadings, that after verdict the pleadings are presumed to be amended to correspond with the proof.

"ANY."

The Court will see, by referring to plaintiff's brief on this subject, that the United States Supreme Court, the Ninth Circuit and the State Supreme Court, in a case decided less than a year ago had the word "any" used in identically the same way as it was used in the case at bar, and in all three of the courts, the Court will see that it has recently been decided that this is too trivial and too technical an objection to permit the granting of a new trial.

DAMAGES.

The Court should indicate, if he believes that the verdict in this case is excessive, as to what he believes would be ample and proper compensation for plaintiff's injuries. There being no legal grounds on which a new trial can be given, under the decision of our higher courts, the Court should, in all fairness to plaintiff, indicate as to the amount he would be willing to accept rather than to go to the expense of a new trial or an appeal. To save the Court's time as well as the time of the parties interested herein, the plaintiff believes that this should be done.

$12,000 PROPER AMOUNT FOR INJURIES SUSTAINED.

The Court's attention is directed to the fact that there is more than the loss of a right arm in this case. The plaintiff makes allegation of internal injuries in his complaint, and he makes a positive statement in his proof that he has suffered internal injuries and has had pains in his chest ever since the accident. This fact was not disputed by the defendant company. On this subject of the seriousness of the injury, the Court's attention is directed to the following questions and answers as taken from the statement of facts:

24-2 He says that it tore him open here on the chest, right down by the arm.

Is there a scar there still?

Yes, sir.

How much of your chest was torn open by the gravel machine?

All that one side.

How much of a cut was on your face?

All that one side and it gave him quite a few slashes in the face.

Is that scar here the result of that accident?

Yes.

What pains, if any, have you had, since your arm was taken off?

He has pain through his chest *all the time* ever since the accident—through his chest and all on this one side.

Have you any pains in your right stump—right arm, since the accident.

Yes, it pains him very badly, he says, something all the time.

80-11 (Dr. Bruce Elmore) What other injuries, if any, did he receive?

There were several abraisons about the face.

Well, were there any abrasions on the right breast?

There was.

How did he respond?

As far as physical condition goes—of course there was a great deal of shock when I first saw him about two hours after the accident, he was in considerable shock, but after the operation and he was given a salt solution, he rallied very well. He was a strong man and he rallied nicely.

From your experience as a physician, after performing that operation, what would you say as to whether there would be any other ill results following from the loss of that arm, other than the loss of the arm itself, any constitutional injuries resulting from it?

In very few cases would there be any.

I don't understand your question, certainly he had pain.

I show you some scars, doctor, is that approximately where they were?

I know they were in close relation to the arm.

I show you a scar here, is that approximately where the cut or abrasion which you mention was?

I think so, I know it was on the face.

There was considerable blood flowing from the wound was there not?

O, yes.

Considerable blood flowing from his arm and also his face?

Why, he was covered with blood.

104-23 (David Roberts) Is it customary for the company to send you out when men are hurt like this?

In *some cases*, yes, where they are serious.

VERDICT NOT EXCESSIVE, CONSIDERING INJURY.

The United States Government, in its wisdom, in passing its pension legislature, has decided that an arm is worth just as much as a leg. The government pays at the rate of $45.00 a month for the loss of an arm, which would mean $540 a year, or $18,900 for thirty-five years. The insurance companies of the country figure an arm and leg worth the same amount. This man was making $3.00 a day at the time he lost his arm. Allowing him to be away from his work 65 days this would figure up at $900 a year, or approximately $31,000 for this man's expectancy, and figuring that he would make half as much, which he cannot do now, as he would have made before he was injured, this gives a figure of $15,750, and he probably would have lived many years beyond his expectancy.

IF NEW TRIAL GRANTED, APPEAL WOULD HAVE TO BE TAKEN.

If the Court believes, after going into the evidence, that the verdict was excessive, if he will indicate what he believes to be a proper verdict, a new trial and appeal would be averted. This would avoid a long drawn out litigation, perhaps another tedious trial, and a year's delay in a suit which might be settled immediately, if other action were taken.

VERDICT NOT EXCESSIVE.

At page 3669 of Sutherland on Damages, we find this statement:

"There is no absolute rule to determine whether the verdict awards an excessive amount or not. It has been held that if the sum allowed is *much above or greatly below* the average that it is fair to infer, unless the case present extraordinary features, that partiality, prejudice or some other improper motive has led the jury astray. The same reluctance is manifested against setting a verdict aside, because of the inadequacy of the amount awarded as exists where the objection is that the award is excessive. It will be presumed that the jury found every fact to mitigate or reduce the damages which the evidence warranted."

$12,000 Loss of arm. *R. R. v. Randall*, 50 Tex. 254.

$10,000 Loss of arm. *Baltzer v. R. R.*, 89 Wis. 257; 60 N. W. 716.

$1,100 Loss of foot. *Jordan v. R. R.*, 16 Daly 130.

$10,000 Injury one leg and shoulder. 6 Utah 357, 23 Pac. 762.

$10,000 Loss of leg. *R. R. v. Mitchell*, 87 Ky. 327.

$10,000 Loss of leg. *R. R. v. Moore*, 31 Kan. 197; 1 Pac. 644.

$10,000 Loss of leg. *R. R. v. Mackay*, 33 Kan. 298; 6 Pac. 291.

$15,000 Loss of leg and suffering. *R. R. v. Spurney*, 97 Ill App. 570.

$15,000 Fracture of leg. *W. U. Tel. Co. v. Eyler*, 21 C. C. A. 246 (75 Fed. 102).

$12,000 Arm off, head injured. *Renne v. Co.*, 107 Wis. 305; 83 N. W. 473.

$15,000 Injury to right arm, impaired memory, woman. *Morgan v. R. R.*, 95 Calif. 501; 30 Pac. 601.

$15,000 Loss of leg. *Galveston & Co. v. Cooper*, 2 Tex. Civ App. 42; 20 S. W. 990.

$15,000 Arm permanently crippled and surgical operation. *DeWardener v. R. R.*, 37 N. Y. Supp. 123.

$20,000 Portion both legs. *Fonda v. St. Paul*, 77 Minn. 336; 79 N. W. 1043.

$10,500 Foot. *Chapman v. U. Pac.*, 12 Utah 68; 41 Pac. 562.

$11,000 Man 30, earning $540 a year with chance for more. Permanently disabled. *Belair v. Ry. Co.*, 43 Iowa 662.

$12,500 Man 60, made invalid. *R. R. v. Bode*, 51 Ill App. 440.

$10,000 Woman earning $300 to $350 housekeeper, $500 or $600 teacher, permanently crippled, unable to work. *Collens v. City*, 35 Iowa 432.

$15,000 Physician, earning $1,200 to $1,500, almost totally disabled. *R. R. v. Pence*, 79 Ia. 389; 44 N. W. 686.

$15,000 Painter, $3 a day, unable to stand erect, deformed and incapacitated. *Schneider v. R. R.*, 59 N. Y. Super. 536.

$15,000 Laborer, 35, wholly disabled for work. *Solarz v. R. R.*, 73 Hun. 512.

$10,000 Loss of leg. *Tierney v. R. R.*, 33 Minn. 311; 23 N. W. 229.

$10,000 Loss of leg. *Porter v. R. R.*, 71 Mo. 66; 36 Am. Rep. 454.

$10,000 Loss of leg. *Taylor v. R. R.*, 16 S. W. 206.

$10,000 Loss of leg. *Hollenbeck v. R. R.*, 34 S. W. 494.

$10,750 Loss of foot. Not incapacitated from following business as bookkeeper. *Kennon v. Gilman*, 9 Mont. 108; 22 Pac. 448.

$12,000 Loss of foot. *Trinity v. Lane*, 15 S. W. 447.

$10,000 Loss of foot, minor 24. *Bowers v. R. R.*, 4 Utah 215.

$11,000 Loss of leg. *Berg v. R. R.*, 50 Wis. 419; 7 N. W. 347.

$10,000 Loss of arm. *Co. vs. Rembars*, 51 Ill. App. 543.

$12,500 Loss of arm. *Rodney v. R. R.*, 127 Mo. 676; 23 S. W. 887.

$11,000 30, permanently disabled. *Belair v. Chicago*, 43 Iowa 662.

$10,885 One hand incapacitated, much pain. *Sesselman v. Nutrop*, 76 App. Div. (N. Y.) 336.

$10,000 Right arm crushed and amputated and other injuries. *Galveston v. R. R.,* 17 Tex. Civ. App. 585.

$11,000 Right arm practically useless. *Baird v. N. Y.,* 172 N. Y. 637.

$10,000 25 years. Loss of right hand. *Union Pac. v. Young,* 19 Kan. 488.

$12,000 Girl 8 yrs., severe and serious injuries, reduced from $30,000. *Mitchell v. Ry.,* 13 Wn. 560.

$10,500 Woman 38, displaced womb and probable amputation of limb. *Smith v. Spokane,* 16 Wn. 403.

$15,000 Woman 30, earning $50 a month. *Sears v. R. R. Co.,* 6 Wash. 227.

$14,000 Loss of leg. *Melse v. Co.,* 42 Wn. 356.

$15,000 Not excessive—single woman 31—left leg cut off 5 inches below knee, and her expenses were $500. *Buggs v. Seattle Elec.,* 54 Wash. 483.

$12,000 Loss of leg to boy of 5 years. *Aperton v. Second Ave. R. R.,* 40 N. Y. S. R. 231.

$10,000 Loss of leg. *Atchison R. R. vs. Moore,* 31 Kan. 197.

$18,000 Excessive injury to brakeman with interest at legal rate amounts to $1,800. Three times as much as he would have earned. *Chicago v. Jackson,* 55 Ill. 497.

$25,000 Boy 13 lost both hands. *Olson v. Co.,* 58 Wn. 151.

$18,000 Woman, broken arm could not be set straight, fracture of skull, headache, weak eyes. *Stevens v. Long Is.,* 54 App. Div. (N. Y.) 623.

$15,000 Loss of arm. *Ill. Cent. v. O'Connor,* 90 Ill. App. 142.

$14,000 35 yrs. R. R. man, loss of arm, earning $115 a month. *Galveston v. R. R. Texas,* 47 S. W. 1050.

$12,000 Street car conductor, compound fracture, stiffening of one arm, usefulness impaired, 9/10. *N. Chicago v. Dudgeon,* 83 Ill. App. 528.

$11,000 Brakeman, 34 yrs., earning $90 a month, usefulness of arm and hand destroyed. *Galveston v. Courtuez,* 30 Tex. Civ. App. 544.

$11,000 Fireman, $80 a month salary. Right arm useless. *Baird v. N. Y. Cent.,* 172 N. Y. 637.

$18,000 Leg and permanent injury to other foot. *Galveston v. Haynes,* 21 Tex. Civ. App. 34.

$15,000 Foot and ankle broken. *Galveston v. Cooper,* 2 Tex. Civ. App. 42.

$12,500 Cab driver, $12 a week, fracture of jaw and fracture of both legs. Though considered large not disturbed. *McDonnell v. Henry,* 44 N. Y. Supp. 652.

$12,500 Loss of arm, switchman. Was sustained. *Rodney v. St. Louis,* 127 Mo. 676.

$25,000 Reduced to $10,000. Oiler, right arm between hand and elbow. *O'Connell v. Am. Sug. Ref. Co.,* 41 App. Div. 307; 58 N. Y. Supp. 640.

MINOR INJURIES.

$8,000 Down.

$8,000 Loss of left arm and hearing of left ear. *Anglo-Am. Packing Co. v. Baier,* 31 Ill. App. 653.

$7,500 Arm amputated near shoulder. *Gibson v. Glyozor,* 76 Ill. App. 400.

$2,750 Two fingers and part thumb. Earnings decreased 50 cents a day. *Easterly v. Co.,* 60 Wash. 647.

$5,000 Two fingers. Reduced $2,500. *Barclay v. Puget Sound Lumber Co.,* 48 Wash. 241.

$1,500 Reduced to $1,000, loss little finger, hospital 2 hours. *Olson v. Tacoma Smelter Co.,* 50 Wn. 128.

$3,500 Reduced to $2,000. Slight abrasion of knee, healing at once and causing no subsequent trouble. *Billings v. Snohomish,* 51 Wash. 135.

$2,080 Not excessive, loss of tips of four fingers of left hand, 28 years old. *Durkey v. Green Lake Shingle,* 51 Wash. 145.

$7,500 Not excessive, 28 yrs. old. Stevedore, knee cap and elbow joint fractured—bones removed and lost use of arm. *Pearson v. Alaska Pac. S. S. Co.,* 51 Wash. 560.

$3,708 Reduced to $3,008. Carpenter, 28 yrs. Little finger of left hand, middle finger above knuckle joint and end of index finger, leaving sensitive to touch and cold. *Rova v. Seattle Elec.,* 55 Wash. 217.

$6,375 Reduced to $4,000. Oiler, 50 yrs. old. Injury to ankle obstructing movement somewhat. Required him to walk with cane. Hospital 2 weeks. *Smith v. Hewitt Lumber Co.*, 55 Wash. 357.

$5,000 O. K. fracture of leg and arm. *Hosett v. Preston Mill Co.*, 55 Wash. 416.

$3,000 O. K. Broken ankle. 35 yrs. old. Part ankle bone removed and some evidence to show permanence. *Kean v. Seattle*, 55 Wash. 622.

$5,000 Reduced to $3,000. Broken nose and foot injured. *Jewell v. Trans. Co.*, 55 Wash. 156.

$5,250 1 inch off limb. *Muller v. Wash. Water Pow.*, 56 Wash. 556.

$4,000 Jaw fractured and ear. *Wells v. Moran*, 55 Wash. 102.

$3,000 Little finger—middle finger part—end index finger. *Rudi v. Seattle*, 55 Wash. 217.

$2,500 Great toe and slight limp. *Nelson v. Brownley*, 55 Wash. 256.

$8,000 Truckman, 25 yrs., loss of use of right arm, large but not excessive, though earned as much after accident as before. *Okube v. R. R.*, 53 N. Y. Supp. 940.

$5,000 Broken leg, 67 yrs. old. *No. Chgo. vs. Wiswell*, 68 Ill. App. 443.

$2,000 Broken arm. *New Orleans v. Schneider*, 60 Fed. Rep. 210; 8 C. C. A. 571.

$4,500 Broken arm, woman 54, set O. K., reduced to $2,500. *Hays v. Seattle*, 57 Wash. 230.

$3,700 Not disturbed. Street car accident, witness testified to injury to spine where two doctors appointed by Court testified that plaintiff had no serious trouble of any kind. *Van Dyke v. Seattle Elec.* 55 Wash. 687.

HERBERT W. MEYERS,
Atty. for Pltf.

November 6, 1911.

Indorsed: Plaintiff's Supplemental Brief. Filed U. S. Circuit Court, Western District of Washington, Nov. 6, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

On application of Herbert W. Meyers, attorney for the plaintiff above named and for good cause shown, the motion for new trial having been granted,

IT IS ORDERED that the time within which the plaintiff may file its bill of exceptions in the above entitled cause to matters occurring at the trial and duly excepted to, be extended by the Court from November 16th, 1911, to the 1st day of December, 1911, in which to file and serve his bill of exceptions.

Done in open Court this 11th day of November, 1911.

C. H. HANFORD, Judge.

Indorsed: Order Extending Time to File Bill of Exceptions. Filed U. S. Circuit Court, Western District of Washington, Nov. 11, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Order.

This cause coming on to be heard on the application of Herbert W. Meyers, attorney for plaintiff, for an extension of time within which to file in this Court plaintiff's proposed bill of exceptions, and it being made to appear to the Court that it is impossible for the plaintiff to file the same before December 5, 1911.

It is now by the Court ordered that the time for filing the bill of exceptions herein be extended and plaintiff is hereby granted until December 5, 1911, within which to prepare, serve and file his proposed bill of exceptions.

Done in open Court this 29th day of November, A. D. 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Nov. 29, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Order.

This matter coming on for hearing this 29th day of November, 1911, and the Court being satisfied that this is a case in

which permission to file an amended complaint should be granted;

IT IS NOW BY THE COURT ORDERED that the plaintiff may file an amended complaint in this cause, making further and more detailed allegations as to safe place in said complaint.

DONE IN OPEN COURT this 29th day of November, 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Nov. 29, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

United States Circuit Court for the Western District of Washington.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.

No. 1934.

Praecipe.

To the Clerk of the above Entitled Court:

You will please have subpoena made out for December 19, 1911. Sam Marcovich, Wm. Savage, Mele Melovich and John Doe (?).

HERBERT W. MEYERS.

Indorsed: Praecipe for Process, etc. Filed U. S. Circuit Court, Western District of Washington, Dec. 12, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

SECOND AMENDED COMPLAINT.

Plaintiff complains of defendant and alleges:

I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Massachusetts, maintaining an office in the City of Seattle, State of Washington, with one, M. J. Whitson as its resident and statutory agent, and as such may sue and be sued in the Courts of the State of Washington.

II.

That the defendant on the 12th day of July, 1910, and prior thereto, operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: a concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small building, and a large building or structure some sixty (60) feet in height wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery, which said establishment was used by the defendant in the production and manufacture of a mercantile substance or commodity known as concrete.

That the buildings were all of a permanent nature and a

part of the concrete manufacturing plant maintained by defendant company in manufacturing concrete for the Snoqualmie Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and with which cogs and gears the employes of the defendant were liable to come in contact, while in the performance of their duty as such employes, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employes therefrom, and without interfering with the efficiency of said machinery by so guarding.

IV.

That the defendant, on or about the said date and prior thereto, failed and neglected to provide a safe place in which for plaintiff to work and reasonable guards for the said cogs and gears were wholly unprotected.

V.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in and about said factory or mill and that on said date plaintiff was ordered by the foreman or superintendent acting for the defendant corporation to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's direction as aforesaid; he came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have

and did have his said right arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of his said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three-inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pain in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physician believe to be the result of internal injuries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machine aforementioned; that this work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely, on or about July 6, 1910, plaintiff's former boss or head, the engineer aforementioned, was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the head engineer aforementioned.

Plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had, according to instructions, done said oiling about four or five times and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery.

Plaintiff, at the time of said injury, was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VI.

That the aforesaid injuries to the plaintiff were not due to any carelessness, fault or negligence of his own, but were due to and occasioned by the indifference, carelessness and gross negligence of the defendant corporation. That the carelessness and negligence aforesaid consisted in failing to provide a safe place for plaintiff to work in and to provide and maintain reasonable safe guards for the aforesaid cogs, shafts and gearing.

VII.

That within six months after plaintiff received said injuries, to-wit, on the 19th day of October, 1910, and again on the 2nd day of November, plaintiff gave a notice in writing of the time, place and cause of his said injuries to the defendant corporation through M. J. Whitson, its resident and statutory agent, which notice was signed by Herbert W. Meyers, attorney in his behalf; that defendant has made no settlement for said injuries or for any of them, and that one year had not elapsed since the happening of said injuries at the time the original complaint was filed.

VIII.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three Dollars ($3.00) per day and by reason of this accident he had lost in wages approximately Two Hundred Sixty-two Dollars ($262.00) up to the time of filing his original complaint.

IX.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand Dollars ($12,000).

WHEREFORE, plaintiff asks for judgment against the defendant for Twelve Thousand Two Hundred Sixty-two Dollars ($12,262.00), together with his costs and disbursements in this action incurred.

HERBERT W. MEYERS,
Attorney for Plaintiff.

State of Washington, County of King—ss.

ELI MELOVICH, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

His
ELI X MELOVICH
Mark

Witness: CHARLES A. ENSLOW.

Subscribed and sworn to before me this 11th day of December, 1911.

(SEAL) HERBERT W. MEYERS,
Notary Public in and for the State of Washington, residing at Seattle.

Copy of within second amended complaint received and due service of same acknowledged this 11th day of December, A. D. 1911.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Second Amended Complaint. Filed U. S. Circuit Court, Western District of Washington, Dec. 12, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.
No. 1934.

ORDER APPOINTING INTERPRETERS.

Now on this day upon motion of counsel for plaintiff and for sufficient cause appearing, it is ordered that Mr. Eli Melo-

vich and Mr. Pete David, be and they are hereby appointed and duly sworn to act as interpreters during the trial of this cause.

December 21, 1911.

Page 474 Journal 1, Circuit Court.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff and Defendant in Error,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant and Plaintiff in Error.
No. 1934.

ORDER TO TRANSMIT EXHIBITS.

Now on the 1st day of July, 1912, upon motion of Messrs. Kerr & McCord, Attorneys for Defendant and Plaintiff in Error, and it appearing to the Court that it is impracticable to transcribe Plaintiff's exhibits A, B-1, B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, B-12 and B-13, and Defendant's exhibits 1, 2 and 3, filed in this Court, it is ordered that said exhibits may be by the Clerk of this Court transmitted to the Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of record on appeal in this cause.

FRANK H. RUDKIN, Judge.

In the Circuit Court of the United States for the Western District of Washington.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.
Verdict.

We, the jury in the above entitled cause, find for the plaintiff and assess his damages at four thousand two hundred and sixty-two ($4,262.00) dollars.

SAMUEL DUNLAP, Foreman.

Indorsed: Verdict. Filed U. S. Circuit Court, Western District of Washington, Dec. 22, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

MOTION FOR NEW TRIAL.

Comes now the defendant, Stone & Webster Engineering Corporation, and petitions and moves the Court to set aside the verdict returned by the jury in the above entitled cause on the 22d day of December, 1911, and to set aside the judgment

entered thereon, and to order a new trial in said cause, upon the following grounds and for the following reasons:

I.

Insufficiency of the evidence to justify the verdict and the judgment.

II.

Errors in law occurring at the trial and duly excepted to at the time by the defendant.

III.

For the reason that the Court should have granted the motion of the defendant for a directed verdict, made at the conclusion of the testimony, the evidence clearly showing that the plaintiff assumed the risk by continuing in his employment with full knowledge and appreciation of the dangers incident thereto. The evidence showing that the plaintiff was a man of average capacity and that the danger resulting in his injury was open, obvious and apparent and was known, understood and appreciated by him, and for the reason that the plaintiff was guilty under the evidence of contributory negligence in allowing his clothing to come in contact with an obvious and open danger.

IV.

That the evidence is insufficient to support or justify the verdict and a judgment against the defendant in that it clearly showed that the plaintiff assumed the risk of all open and obvious dangers.

V.

For the reason that the Court committed error in refusing to give the several instructions numbered from one to eighteen inclusive, requested by the defendant, and for error in refusing to give each of said instructions.

VI.

For the reason that the Court erred in giving certain instructions to the jury which were duly excepted to by the defendant at the trial, and in accordance with the rules of this Court.

This petition for a new trial will be based upon the pleadings, papers on file, minutes of the Court, notes and memoranda kept by the Judge, and upon the transcript of the testimony taken by the reporter who reported the case.

KERR & McCORD,
Attorneys for Defendant.

Copy of within petition received and due service of same acknowledged this 30th day of December, 1911.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Petition for New Trial. Filed U. S. Circuit Court, Western District of Washington, Dec. 30, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendants.
No. 1934.

To the Stone & Webster Engineering Corporation and to Kerr & McCord, their attorneys:

You and each of you will please take notice that the plaintiff, by his attorney, Herbert W. Meyers, will, on Tuesday morning, January 2nd, 1911, at 10 a. m., ask the Clerk of the United States Circuit Court to tax his costs in the above entitled cause in accordance with the cost bill attached hereto.

HERBERT W. MEYERS,
Attorney for Plaintiff.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff.
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

MEMORANDUM OF COSTS AND DISBURSEMENTS.

Disbursements.

Clerk's fees, to be taxed	$
Service fees	
Serving subpoena on Mele Melovich, Darrington, Wash.	
Serving subpoena on Wm. Savage, Seattle, Wash.	2.12
Serving subpoena on M. C. Lord, Seattle, Wash.	2.12
Attorneys fees	20.00
Reporter's fees (if not paid by defendant)	25.00
Witness fees:	
Mele Melovich, 2 days	6.00
Mele Melovich, mileage, 54 mi., Darrington to Seattle	5.40
Wm. Savage, 3 days	9.00
Sam Marcovich, 2 days	6.00
Sam Marcovich, mileage, 54 miles, Darrington to Seattle	5.40
Mrs. Eli Bielich, interpreter, 3 days	9.00
O. D. Edmundson, 3 days	9.00
M. C. Lord, 2 days	6.00

United States of America,
Western District of Washington.—ss.

Herbert W. Meyers, being duly sworn, deposes and says; that he is the attorney for the plaintiff in the above entitled cause, and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct

to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

HERBERT W. MEYERS.

Subscribed and sworn to before me this 23d day of December, 1911.

(SEAL) JAMES E. McGREW,
Notary Public in and for the State of Washington, residing at Seattle.

Recd. copy this 23d day of December, 1911.

KERR & McCORD.

Indorsed: Memorandum of Costs and Disbursements. Filed in the United States District Court, Western District of Washington, Jan. 11, 1912. A. W. Engle, Clerk. By S. Deputy.

In the Superior Court of the State of Washington in and for the County of King.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Order.

IT IS ORDERED, That the defendant be and it is hereby given thirty days from this date within which to prepare, file and serve its proposed bill of exceptions.

C. H. HANFORD, Judge.

January 26, 1912.

Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Jan. 26, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Order.

This matter coming on for hearing this —— day of February, 1912, on the motion of the defendant for a new trial, and the plaintiff being represented by his attorney, Herbert W. Meyers, and the defendant by its attorneys, Kerr & McCord;

It is ordered, adjudged and decreed that the motion for new trial be denied and that judgment be entered accordingly, and defendant excepts and exception allowed.

Done in open Court this 14th day of February, 1912.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western District of Washington, Feb. 15, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Judgment.

BE IT REMEMBERED that this cause came duly on for trial on the 20th day of December, 1911, and the same was con-

tinued until December 21st, and said trial proceeded until and including the 22nd day of December, 1911.

Plaintiff appeared in person and by Herbert W. Meyers, his attorney, and defendant appeared by Kerr & McCord, its attorney, thereupon a jury of twelve good and lawful men of the district was empanneled and sworn, and the plaintiff introduced his testimony and rested, and defendant introduced its testimony and rested; the cause was argued to the jury by counsel upon either side and the jury was charged upon the law of the case by the Court, and thereupon retired in charge of a sworn bailiff, to consider its verdict, and said jury, after duly considering the same, did on the 22nd day of December, 1911, return its verdict wherein and whereby it did find in favor of plaintiff and against the defendant, and assessed the plaintiff's damage in the sum of $4,262.00.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff do have and recover from defendant, judgment in the sum of $4,262.00 and for his costs and disbursements hereinafter to be taxed, for all of which let execution issue.

DONE IN OPEN COURT this 15th day of February, 1912.

C. H. HANFORD, Judge.

Indorsed: Judgment: Filed in the U. S. District Court, Western Dist. of Washington, Feb. 15, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Stipulation.

IT IS STIPULATED by and between Herbert W. Meyers, attorney for the plaintiff, and Kerr & McCord, attorneys for

the defendant, that the time for filing and serving a bill of exceptions in the above-entitled cause may be extended ten days and until the 25th day of March, 1912.

Seattle, Wn., March 14th, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.
KERR & McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 14, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1934.

Order.

On the stipulation of the parties to this action it is by the Court

ORDERED that the defendant is hereby granted until the 25th day of March, 1912, to file and serve its bill of exceptions upon the plaintiff in the above-entitled cause.

C. H. HANFORD, Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 14, 1912. A. W. Engle, Clerk. By S., Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

PLAINTIFF'S PROPOSED AMENDMENTS TO DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

Comes now the plaintiff and proposes the following amendments to the proposed bill of exceptions in this cause, to-wit:

I.

In line 27, on page 1, add, after words, common law, "Mr. Kerr, in the other trial, made the objection and had us elect between the Factory Act and the common law."

II.

In line 16, on page 2, insert after the word "machine," "that he was not given any instruction about the gravel machine when he went to work on the motor."

III.

In line 18, on page 2, insert after the word "machine,"

Q Was the machinery protected or guarded in any way?

Mr. McCord: "I object to that as irrelevant, immaterial, incompetent, and they are not suing under the Factory Act and there is no requirement here that the machine should be guarded, if it was reasonable safe without it, and it is not a proper question it is irrelevant, immaterial and incompetent to show whether or not the machine was guarded.

THE COURT: Are you contesting this point? Do you claim that it was guarded?

MR. McCORD: No, sir; I do not claim it was guarded, but

I do not think they have any right to show whether or not it was guarded.

THE COURT: If you object to the question on the ground that it is leading I will have to sustain it.

MR. McCORD: I object to it on the ground that it is leading, irrelevant, immaterial and incompetent and not within the issues.

THE COURT: I will sustain the objection. * * *

MR. MEYERS: May it please your honor, with an ignorant witness of this sort would your honor suggest how I could get that fact out?

THE COURT: Ask him to describe that machine.

MR. MEYERS: The motor below?

THE COURT: Yes. Now, I have played the school master here quite enough.

MR. MEYERS: With an ignorant witness of this sort it is pretty hard at times not to lead him some.

IV.

In line 21, on page 2, after the word "little" insert the word "machine."

V.

Insert between lines 29 and 30, on page 2:

MR. McCORD: I ask that that portion of the evidence that refers to what Mr. Savage did be stricken.

MR. MEYERS: We consent that that part be stricken, but the portion that says it was covered should remain.

THE COURT: No, I will not strike that out, it may stay.

MR. McCORD: Which machine is this?

MR. MEYERS: This is the motor below, where he was working.

VI.

In line 30, on page 26, strike the words, "how long," after the first question mark, and insert in lieu thereof "What sort of."

VII.

In line 32, on page 28, before the word "work," insert the word "his."

VIII.

Strike lines 9, 10 and 11, on page 40, and insert in lieu thereof:

MR. McCORD: I object to that as irrelevant, immaterial and incompetent under the admission.

MR. MEYERS: Mr. McCord is making the objection that Mr. Kerr made, and your honor ruled with us on that point. I will read it to your honor from the record. It says here: "Q Mr. Savage, do you know whether the cog-wheels and machinery around the motor were guarded or not?" And then it says: "Mr. Kerr: I object to that as irrelevant, immaterial and incompetent. (The objection is overruled and an exception noted for defendant)."

MR. McCORD: Notwithstanding your honor's ruling at that time, I think it wholly immaterial what this other machine was and how it was constructed and what method was used in its construction. The question is whether this machine was the cause of this injury or whether this was not a safe place. That is the only ground of negligence, as I understand it. It does not make any difference as to the other machine.

MR. MEYERS: In this case one of the allegations is to the effect that the company knew that this man was ignorant. Now if we show by a man who was foreman for the Stone & Webster Company at that time that he knew he was so ignorant that he had to take some action, which we will bring out, it seems to me that it is the most salient feature in the case. He was the foreman at the time, which I will bring out in a moment, and the man came there and reported to him and he was looking after the motor at the time as foreman.

THE COURT: I suppose I overruled that objection on the other trial on the theory that that admission was not in the record, but I will overrule the objection now. (Exception noted for defendant.)

Q Do you know whether the cogwheels of the machinery around the motor were guarded—the motor below?"

IX.

In line 5, on page 45, insert after the word "kinds" the following, "and had designed a number of machines similar to the one in controversy."

X.

Insert between lines 17 and 18, on page 46:

Q Prior to the time of the passage of the Factory Act a great deal of the cog-wheels and shafting was left unguarded, wasn't it, in the majority of cases, around saw mills, and it was not guarded as a rule where it was open and where a man could see it—it was not customary prior to the passage of that act, to guard machinery, even in saw mills and manufacturing plants was it?

A Yes, I must say it was; most constructing engineers generally regard it as necessary.

Q But I say—

A (Continuing)—and planned accordingly.

Q I say, it was the general rule to guard it prior to that time, was it?

A I believe, according to my experience it was, yes.

XI.

Insert between lines 27 and 28, on page 46:

Q In a plant of this kind a man would have very little occasion to go up there, except to oil the machinery.

A Well, he would have to go up there for a good many purposes; he would have to go up there to oil the machinery and probably there would be more or less belt troubles that he would have to attend to.

Q He would not come in contact or come near this cog wheel except in oiling the machinery, would he, as a rule?

A Yes, as a rule.

Q Sir?

A That is the rule, yes sir.

Q You heard Mr. Savage say it was about four feet between the bearings, didn't you?

A I don't believe I paid any attention to his testimony.

Q Assuming that he said that, and the cog-wheel was

right in the center, and that would leave two feet to either side for oiling purposes, now there would be no occasion for a man to go above there—

A—(interrupting) You say the shaft is four feet long?

Q Yes.

A Well, of course the shaft would take up a good deal of the space and would not leave much space for a man to get around.

XII.

In line 2, on page 47, add "Of course it depends a good deal on conditions. I did not pay particular attention to that lifting apparatus there. They might have some trouble, due to the apparatus clogging at the point of discharge. It might be possible that a man would have to go up there to clear that sometimes."

XIII.

In line 32, on page 47, insert after the word objection, the following, "by stating that he thought that it was a photograph of the machine out there as it was at the time of the accident, and that it was a photograph of either one or the other of two machines out there." Also, in the same line, on the same page, after the word "that," the words, "as far as he knew."

XIV.

In line 20, on page 48, after "A" (answer) insert, "as I remember this particular platform."

XV.

Insert between lines 5 and 6, on page 50, the following: "Q I will ask you Mr. Sears if you had any familiarity with other gravel plants similar to this one in operation in this state? A Not exactly similar. No; this was an unusual place and required unusual methods of handling gravel."

XVI.

In line 32, on page 50, strike the words, "sir, no."

XVII.

Insert between lines 12 and 13, on page 51, the following:

"Q Do you know where any of the other employes of the company that were present at the time of this accident are now? A I was not at the accident, so I do not know who was there."

XVIII.

Insert between lines 31 and 32, on page 51, the following: "Q (Mr. Meyers) Did you, on the occasion of the former trial, Mr. Sears, make a statement in answer to a question of this sort: 'Q So that in oiling the bearing fartherest away from you what would be the distance he would be required to reach with his oil? A About eighteen or twenty inches.'—I think you just made the statement that it was fourteen and one half—I just wanted to know whether or not you made that statement? A Well, those distances I am giving you are from memory and approximately. I might vary three or four or five inches, and maybe six inches in giving my testimony. Q And did you, on the occasion of the former trial, in response to this question: 'Q How close to it Mr. Sears —close enough so that he could see it? A Oh, yes, probably fifty or sixty feet.' That is, the place where the men would pass in proximity to the gravel machine you just now said ten or fifteen feet—did you make that answer? A Well, I would like to know the question. Q (Reading) 'Q How close to it Mr. Sears—close enough so that he could see it? A Oh, yes probably fifty or sixty feet.'

XIX.

In line 26, on page 52, insert after the word English the words, "very brokenly."

XX.

In line 5, on page 53, after the word elevators, add, "that he does not put those machines up but just sells them."

XXI.

In line 10, on page 53, strike the words, "and that was all the evidence in the cause," and insert in lieu thereof: Dr. Bruce Elmore, a witness on behalf of defendant, testified, that he had been a surgeon for about ten years, was a graduate of

Columbia University that he was the first medical attendant upon plaintiff after the accident. "Q What did you do with him after you found him? A I knew the nature of the injury, that is it had been telephoned down so I at once, with my assistants prepared him and examined the arm and found that it was almost completely severed, there was practically nothing left but a little skin that held the arm to the shoulder, so I did a complete amputation a few inches below the joint. Q How far below the shoulder joint? A I think it is about two inches of bone that is left, I can only state from memory. The witness testified further, that there were a number of abrasions, not many and not severe on the face, head and breast, that he had complete charge of plaintiff from that time on, that he was present at the meeting between Mr. Sears, Mr. Roberts, and plaintiff, in the White Building, that he engaged in the conversation. Upon cross-examination the witness testified as follows: Q (Mr. Meyers) Doctor, in the former trial you were asked this question, (reading): 'Q From your experience as a physician and surgeon and having performed that operation and treated the plaintiff until August, what would you say as to whether there would be any ill results following from the loss of that arm, other than the loss of the arm itself, any constitutional injuries resulting from it. A. In very few cases would there be any.' Now, were you asked that question and did you give that answer? A I presume so. Q. And were you asked this question (reading): 'Q Doctor, you would not say that Eli Melovich, here had not suffered any pains in his chest or had any ill effects so far as that wound is concerned, in coming in contact with the cogs, would you? A I don't understand the question—he had pain certainly,' and you were asked this question (reading): 'Q Dr. I show you a scar here—is that approximately where the cut or abrasion you mentioned was? A Why, I think so—I know it was on the face'—did you make that statement? A I presume I did. Q And did you give this testimony (reading)? 'Q There was considerable blood flowing from that wound, was there not? A Oh, yes'—did you make that answer? A I remember saying there was blood all over. Q 'Considerable blood flowing from his arm and also his face.

A Why, he was covered with blood'—did you make that answer? A Yes.

And now in due time, the plaintiff submits the foregoing as his proposed amendments to the defendant's proposed bill of exceptions herein, and prays that the same may be allowed.

Dated this 1st day of April, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

The foregoing proposed amendments are allowed, except those disallowed as indicated.

C. H. HANFORD, Judge.

May 3, 1912.

Copy of within proposed amendments to proposed bill of exceptions received and due service of same acknowledged this 1st day of April, A. D. 1912.

KERR & McCORD,
Attorneys for Plaintiff.

Indorsed: Proposed Amendments to Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 2, 1912. A. W. Engle, Clerk. By S.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Stipulation.

IT IS HEREBY STIPULATED and AGREED by and between the parties hereto by their respective counsel undersigned, that the Bill of Exceptions in the above entitled matter may be taken up and settled on this the 2nd day of May,

1912, the giving of notice for the settlement of the same being hereby expressly waived.

HERBERT W. MEYERS,
Attorney for Plaintiff.
KERR & McCORD,
Attorneys for Defendant.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, May 2, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Certificate.

This matter coming on this 2nd day of May, 1912, and the Court having read the plaintiff's proposed amendments to defendant's proposed bill of exception and having stricken out on the original the portions which the Court deemed not proper as a part of the proposed bill of exceptions, the Court certifies that the remaining portions of the plaintiff's proposed amendments are and should by right be a part of the bill of exceptions and the Court certifies them as such, the same to be made a part of defendant's proposed bill of exceptions, and to be certified to the Appellate Court as a part of said proposed bill of exceptions. The Court has stricken and disallows the portions stricken out by him and allows plaintiff an exception to said ruling.

C. H. HANFORD, Judge.

Indorsed: Certificate. Filed in the U. S. District Court, Western Dist. of Washington, May 3, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ORDER SETTLING BILL OF EXCEPTIONS.

This cause having been brought on regularly before the Court on this the 3d day of May, 1912, upon the application of the parties hereto for the settling and certifying of the Bill of Exceptions lately filed herein, and the time for the filing, settling and certifying of said Bill of Exceptions having been duly extended by orders of the Court and by the stipulations of the parties until and including this day and the parties having agreed together to submit to the Court the proposed Bill of Exceptions and proposed Amendments to said proposed Bill of Exceptions and all of said amendments so far as are proper having been embodied in said proposed Bill of Exceptions as originally filed by amendment thereof.

THEREFORE, on motion of Messrs. Kerr & McCord, the defendant's attorneys, it is ordered that said proposed Bill of Exceptions heretofore filed by the defendant in this cause as the same now stands amended as aforesaid, be and it is hereby settled as the true Bill of Exceptions in this cause and the same as so settled be now and here certified accordingly by the undersigned Judge of this Court who presided at the trial of this cause and that said Bill of Exceptions when so certified be filed by the Clerk.

Done in open Court this the 3d day of May, 1912.

C. H. HANFORD, Judge.

Indorsed: Order Settling Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, May 3, 1912. A. W. Engle, Clerk. By S., Deputy.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 20th day of December, 1911, the above entitled cause came on for trial before the above named Court and a jury duly empaneled, the Honorable C. H. Hanford, Judge presiding, the plaintiff appearing by his attorney, Herbert W. Meyers, Esq., and the defendant appearing by Messrs. Kerr & McCord, and the following proceedings were had:

Mr. Meyers made a statement to the jury on behalf of the plaintiff.

MR. McCORD: Mr. Meyers, are you proceeding at common law or under the Factory Act?

MR. MEYERS: Common law.

MR. McCORD: I simply wanted to know whether you sue under the common law.

MR. MEYERS: Yes.

ELI MELOVICH, the plaintiff, thereupon testified in his own behalf as follows:

That he resided on July 12th, 1910, at Seattle, Washington, and on that date was working for the defendant at Snoqualmie; that he had been working with pick and shovel, but that his regular work at the time he lost his arm was running a motor down on the ground; that he had done no kind of work on machines and had not seen a gravel machine, except the one referred to in the complaint, and that he did not know anything about the parts of any machinery or about concrete

mixing machinery. That he had never taken any machines apart; that he had been working on the motor about three weeks before he was hurt; that he had been up on the gravel machine referred to in the complaint two or three times before he was hurt. That the motorman instructed him a little about the break—the motorman on the motor machine; that he was not given any instruction about the gravel machine when he went to work on the motor; that he was sent up on the gravel machine by the boss to grease the machine.

Q What was the condition of the motor below that you were working on, when you were working on it?

A There was a little house covering for it below and it was just like running this break on a street car.

Q Could you see the wheels of that machine when you were working around it?

A Well, to answer that question, he says the time he went to work there Mr. Savage came there and covered that wheel—a man named Savage.

Q It was covered?

A Covered on the day I went to work there.

Q Tell the jury, as nearly as you can remember, about the platform on the gravel machine and about the machinery on the top of that platform.

A It was about three feet wide, he should judge, and about five feet long and on that stood the machinery and wheels and belt and a little motor—he can't tell unless he has something to describe it on, he says.

Q What is that, if you know? (showing photograph to witness).

A This is the machine that cut off his arm.

Q Were you present when that picture was taken?

A Yes.

Q About when was that taken?

A A short time after the accident—after he came out of the hospital.

(The witness identified another picture of the machine.)

Q Tell the jury in your own language about the machinery up there and the platform handing Exhibit "A" to the witness).

A Right in there is the platform, at the letter "C." Right in that dark shed, he was right inside, he says.

Q The dark shed marked "B" is where he was at the time. Now show the jury how you got up there.

A There is steps going up there and he climbed up that ladder—well, half the way up he could climb up, and the other half of the way he said he would have to lean away back in order to get in.

Q Show the jury how you had to lean in going up, in reaching the platform; what do you mean?

A Well, he just says that he went up half ways that he could go up straight and then he would have to lean back, he said, to get on that.

Q When you went in the platform, just before oiling, did you approach the platform forward or backwards?

A It is not built so he could go in straight up the ladder —he would have to turn his body back in order to get in there.

Q Show the jury how you oiled the wheels, if you did oil them—show the jury, tell them about that—show the jury just how you oiled the wheels and the cogs—show them here.

A The belt came right up to my back.

Q Which belt?

A This belt right there (showing).

Q The belt marked "D." Now when you got your arm cut off where were you standing?

A Right in the center and that belt was right at the back of his neck; right up his back, and this track wheel where the buckets are, he had to reach over to oil this bucket and this cog-wheel on the outside—he had to reach over there.

Q Why did you reach over?

A There was boards nailed so that it did not allow you go any farther. The platform was small.

Q Can you point to where the boards were that you say kept you from getting any farther over, when you were oiling that wheel?

A That far. He said he could not go any farther than that.

Q Plaintiff points to "E," which he says is the platform which prevented him from going any farther towards the—

MR. McCORD: He didn't say "platform."

MR. MEYERS: He said boards which prevented him from going any closer to the buckets.

Q When the wheel was going around, could you see the cogs?

A It goes fast like the wind is blowing and you could not see it.

Q At the time you had your arm taken off was that cog wheel in any way guarded?

(Objected to and objection sustained.)

Q What was the condition of that cog-wheel at the time you had your arm cut off, Eli?

A He says there was no covering on it at all; no guard on the wheel. He could see it after his arm was taken off.

MR. McCORD: I move to strike that out as irrelevant, immaterial, incompetent and not within the issues.

(Motion denied. Exception noted for defendant.)

Q Tell the jury what kind of an oil can you used?

A Well, he said it was about one foot long and half of it was the oil can and half of it was the spout.

Q Who gave you that can?

A The bookkeeper.

Q When you were oiling the wheels you were looking toward the enclosure or out towards space—toward the wheels?

A He stooped over with his arm to put the oil on the wheel and he was watching to see where he was putting the oil.

Q Were you just as close to the wheels as it was possible for you to get at the time you were oiling them?

(Objected to and objection sustained.)

Q Have you seen that gravel machine since you had your arm taken off, and if so, how many times?

A Yes, sir; four or five times since he had his arm taken off.

Q Was there anything to the right of the boards which you spoke of and which you marked with the letter "E," to have prevented the extending of that platform?

(Objected to and objection sustained.)

MR. MEYERS: I simply want to draw out the fact that he has seen the machine a good many times since then, and

whether or not there was anything to prevent that platform from going out farther.

THE COURT: You have no right to assist him with such leading questions as that. And you are assuming a burden there that you do not have to assume of proving a negative.

MR. MEYERS: The unsafety of the place was the only idea.

THE COURT: Well, if they offer any evidence here to prove that it was impossible to construct that machine differently, you will be allowed, perhaps, to rebut it.

Q With reference to this picture (plaintiff's Exhibit "A") where was the motor on which you were working at the time or just prior to the time when you lost your arm?

A The gravel machine was about fifteen feet above the motor machine, right by the track.

Q Where would that track run on this picture—Exhibit "A"—it is not on there but where would it run with reference to this picture?

A The track ran from the power house and the motor was down on the ground, about from here to where the last seat of the jury would be—the gravel machine would be there from the track, and that was the lower part of the motor machine (showing)—that is where they loaded the cars and that is where the motor ran.

Q Was the machinery running when you were oiling it?

A Yes, sir; if it didn't run it would not take his arm off.

Q Were you ever told anything about stopping the machinery the cogs?

(Objected to and objection sustained.)

MR. MEYERS: It might be all right for them to have oiled it when they were not running, but when they were running the question was, were we told anything about stopping the machinery to oil it?

THE COURT: It is objected to on the ground that it is immaterial. Now it is immaterial under this pleading what he was told and what he was not told, except that he was told to do that work—you can prove that. I will sustain the objection.

Q When you were up there oiling the wheels, Eli, where was your boss?

MR. McCORD: I object to that as irrelevant, immaterial, incompetent, and for the further reason that he has already answered where he was, and it is immaterial where he was.

(Objection sustained.)

Q Could your boss have stopped the machinery that controlled those wheels when you went up?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent.

(Objection sustained.)

Q How long did it take you to oil those wheels?

A Two or three minutes.

Q Was your car motor running or idle when you oiled the cogs?

MR. McCORD: I object to that as immaterial.

(Objection sustained.)

MR. MEYERS: The fact whether the work he was engaged on was being neglected when he went up would have a bearing on the conditions up there and as to his coming back and his duties.

THE COURT: Why, I suppose there are a thousand things that might have had a bearing on it, but we cannot spend the time to chase around after everything that might have had a bearing—it is not alleged in your complaint that it did have a bearing.

MR. MEYERS: Only in a general way.

THE COURT: It is not material and it is not important enough to spend time on.

MR. MEYERS: If we had put all the allegations in they would have made a motion to strike—we merely made the general allegation.

THE COURT: They are not necessary to make out the case.

Q Point out on the picture, Eli, and show the jury where it was that your arm got caught, if it did get caught?

A He was standing at the letter "B," and that belt was right at the back; that little wheel was the one—the letter "D" —he was putting oil in this place (showing).

Q In the box near the wheel marked "F"—now where was your arm caught?

A He sees the big wheel; he says he can't see the little one—it is in there some place (pointing).

Q Point out about where that place was.

A There (pointing).

Q Right here where I am putting the letter "M" is the place that the witness says.

MR. McCORD: I suggest that you let him testify. You can mark the letter if you wish, but let the witness do the testifying.

MR. MEYERS: The witness pointed to where I put the letter "M."

MR. McCORD: I suggest that the stenographer can see where the witness is pointing as well as you can.

MR. MEYERS: The stenographer has his hands full; he has a hard job of it.

MR. McCORD: Well, they are sworn and you are not.

MR. MEYERS: The plaintiff points to the letter "M" as the place where—

MR. McCORD: I object to that; let the witness point himself and not have the counsel testify.

MR. MEYERS: He has done so.

MR. McCORD: Let him do it.

MR. MEYERS: Is there any objection to the jurors taking some of these pictures and examining them?

THE COURT: Have they been offered in evidence?

MR. MEYERS: Yes, they have been offered in evidence.

THE COURT: The jury may use them.

Q Point out on plaintiff's Exhibit "B-1," on this picture (showing) where it was that your arm was caught.

THE INTERPRETER: Now he is pointing right there (pointing).

MR. MEYERS: The plaintiff points to the letter "B" on plaintiff's Exhibit "B-1" as the place where his arm was caught.

Q Can you see on this picture the small cog that ran into the large one that cut your arm?

A It was covered afterwards so that he is not able to see it.

MR. McCORD: I move to strike out the answer as an indirect way of attempting to put in something that is immaterial and prejudicial.

MR. MEYERS: I grant that it may be stricken.

THE COURT: Strike it out.

Q Tell the jury how much space there was between the different pieces of machinery on that platform—how much space there was for you to move about it.

MR. McCORD: I object to that as immaterial, incompetent, irrelevant and leading.

MR. MEYERS: It goes to the safety of the place.

THE COURT: I will overrule the objection.

(Exception noted for defendant.)

THE INTERPRETER: I will have to ask him that question again, because he goes on to describe the whole machinery—I will have to tell him to answer one question at the time.

MR. McCORD: All right.

Q Tell the jury how much space there was between the different pieces of machinery on that platform—how much space there was for you to move about in?

A There was no room to turn around in; he has to stand in one spot to oil, the platform was so small.

MR. McCord: I move to strike that out as a conclusion of the witness; he says he went on the platform and he was asked how much space there was to turn around, and he gave the size of the platform, and it was for the jury to determine whether there was room to turn around there or not and I move to strike it out as stating a conclusion.

THE COURT: The motion to strike is denied. An exception is allowed to the defendant.

A About one foot from the belt to the track wheel.

Q How's that?

A About one foot, I should judge, from the belt to the track wheel.

Q Ask him about the top of the platform, I mean, and not the ground.

A At the top of the platform.

Q Where the different pieces of machinery were?

A Yes, where the gravel machine was, between the wheels

about one foot, and about another foot between that wheel and the other wheel, and the other wheel there was a box to be oiled about half a foot from the wheel and he had to reach over there and that is why his arm was taken off.

MR. McCORD: I move to strike out the latter part of the answer as to why his arm was taken off as irrelevant, immaterial and incompetent and it is for the jury.

(Motion denied. Exception noted for defendant.)

Q. Show the jury just how your arm was caught and just where it was caught.

A He went up on top and as he reached over in to put the oil in the bucket it caught his arm.

Q Where did the cog catch your arm?

A Right here (showing) in the back there—the seam in the back of the arm. The track was right in front of him and it caught him there.

Q Show us again?

(Witness does so.)

Q How far from your shoulder was the place where the cog caught your arm?

A It caught him right there in the back there and tore it right off.

MR. MEYERS: Plaintiff points to a place about three or four inches from his shoulder as the place where the cog caught his arm.

Q How did you get your arm out of the wheel?

A The boss, Slim, helped to take it out and the gentleman by the name of Sam Markovich.

Q How long were you in the hospital?

A About four weeks.

Q Tell the jury all about your injuries and what pains you had as the result of the accident.

A He says they were about thirty minutes getting him out of the machine and he says there was three or four helped him down and then he went to the hospital—they took him to the hospital at North Bend and they operated on him and took his arm off.

Q Take off your coat, Eli (witness does so). How much of a stump have you got there, Eli?

A About two inches, he says.

Q Tell the jury just all about your injuries now.

A He says he could show you by unfastening his shirt, the scar; he is taking his necktie off.

Q Tell the jury now just—

A He says he was cut on the forehead and on the side of the face—torn—and this scar here—he was torn open, he said, here (showing) on this scar and away down on the right side, and all the way down it shows scars and in the back of the shoulder it shows scars.

Q How about your head; did it hurt your head in any way?

A The little track wheel cut off his arm and the big track wheel tore his face off; he says it opened it up there.

Q The after cog-wheel?

A Yes.

Q Have you scars in your head?

A Yes, he says it was all cut through there. Here, he says, it is a scar on the head right in front (pointing).

Q What pains do you have now, if any, as a result of the accident?

A It pains all the time; he says he is feeling like as if that arm remains hanging there and that side pains him all the time, he says.

Q Which side?

A The right side, he says. This side always feels that it is bound tight and numb, dull feeling.

Q Do you have any pains in your right side, aside from the arm?

A Do you mean the left side?

Q The right side.

A He says sure that it pains him.

Q Did the accident in any way affect your eating?

A He says sure that it does, he can't cut his meat.

Q I mean directly after the accident, did it in any way affect your eating?

A For seven days he didn't eat anything and for twelve days he could not sleep—he did not sleep at all on account of his legs swelling up so.

Q Did both of your legs swell up?

A Both of them—both legs were swollen up so that he could not move them without the assistance of his hand to move them.

Q Did he say anything about sleep?

A He said he could not sleep for twelve days and nights.

Q What wages were you earning when you got hurt, Eli?

A Three dollars a day.

Q Are you working now?

A He does not work any now.

Q Why not?

A He said he went around to work to several different places, but they said there was too many men without work that had two arms, he said, not men with one arm.

Q What work can you do now?

A He says he don't know whether he can do anything, as well as they didn't give it to him.

Q Can you feed yourself and cut your own meat?

A He can't, he says.

Q Can he lace his shoes?

THE COURT: I want the jury to take notice of those questions—the witness is not giving any testimony when he is asked leading questions like these.

MR. MEYERS: It will take the witness a week if I don't lead him—these questions were not objected to at the last trial. I will go ahead and ask him the other questions, but it will take three or four days and I want to get through, if possible, as soon as we can.

THE COURT: I have never seen a trial shortened by multiplying questions. If you keep on here you can think of a great number of things he can't do—you are asking him whether he can do this and do that and do the other thing—it is just a question of how long the Court will indulge you to ask this kind of questions.

Q Had you been working steadily before you were hurt, Eli?

A Yes, all the time.

Q Were you healthy before you got hurt?

A Yes, always.

Q Before you lost your arm were you right or left-handed?

A Right-handed.

Q Did you have any trouble in using your left arm?

A Yes.

Q Are you married or single?

A Married and have got two children, he said.

Q Prior to losing your arm were you kept from your work by reason of any poor health at any time or by reason of any accident?

MR. McCORD: I move to strike out the answer of the witness as to his having a wife and two children. I thing it is wholly immaterial.

MR. MEYERS: It may be stricken. We have no objection to that.

Q Did you ever see any one go up to oil the gravel machine before you did?

(Objected to and objection sustained.)

Q Did you ever see any one get hurt on the gravel machine before that?

(Objected to and objection sustained.)

Q While you were working for the Stone & Webster Company did you work every day or only some days?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent.

THE COURT: I will sustain the objection.

MR. MEYERS: The question of the man's making $3 a day and the amount he will lose in the future is a proper element of damage. If they worked Sundays and holidays and all the time, as is not customary in some places, I think it would be material. The jury might think, perhaps, that they were not working Sundays, but he always worked Sundays. I say this because the witness cannot understand me.

THE COURT: I will sustain the objection.

Q If you were standing over as far to the right of the gravel machine as you could get, what wheel would you be in front of?

MR. McCORD: I object to that as irrelevant, immaterial, incompetent and leading.

(Objection sustained.)

MR. MEYERS: The only thing is that the pictures which we have been able to get are not as good as they might be and it is so dark in there that the jury would not be able to understand exactly where he would be unless they knew which wheel he was in front of.

THE COURT: He has testified as to the situation there and the circumstances. Now it does not help your side of the case to dissect and mince and pulverize this testimony by minute cross-examination. Mr. McCord will do that for you enough.

MR. MEYERS: They will do that and will leave a wrong impression.

THE COURT: Let him state a fact in its simplicity; it has weight and force and the jury can comprehend it. It only confuses it to make a prolonged cross-examination of your witness—it weakens his testimony and takes time. I think you have cross-examined him enough.

MR. MEYERS: I was trying to elicit testimony to help the Court and the jury—that is all, Your Honor.

CROSS-EXAMINATION.

MR. McCORD:

Q Take these two chairs and turn them towards each other this way and this pointer lying across the backs of the two chairs, and I will ask you to state if this pointer does not represent the shaft on which the cog-wheels that ran this machinery were fastened or attached?

A These are the steps, the posts.

Q Like these posts of the chairs?

A The timbers, but here, he said, the track wheel was there and the belt was on the end and the bucket wheel was there (showing) and the buckets were on the end—it is longer than this. He reached from here up to put the oil in the bucket.

Q I want to know how was the shafting fastened to these posts. Did they have bearings?

A By shaft—this is the shaft (pointing).

Q That is the shaft—this stick that I point out is the shaft—is that right—and the shaft fastened on the post, with one bearing on the left and one on the right, wasn't it?

A Yes, sir, one on each side.

Q Fastened with bearings, and the shaft revolved in those bearings, did it?

A And another shaft over there.

Q Now then, you had the cog-wheels right in the center of this shaft, in this open space?

A Yes.

Q How many cog-wheels were there? Two?

A Two, one big one and one little one.

Q Where was the little one located with reference to the big one?

A The small one was there and the big one went around that way (showing).

Q They were right side by side, were they—you answer that question. Were the cog-wheels side by side or where were they?

A The big one is up above the small one.

Q Both cog-wheels were on the same shaft, were they?

A No.

Q Where were they—on the same shaft?

A One over here on one shaft and one on this shaft.

Q Which one was the big cog-wheel on?

A On this side.

Q On the side farthest away from you?

A Yes, the one farthest away.

Q And the small cog-wheel was the one next to you?

A Well, they were right close together.

Q How far apart were they?

A No, there was no distance between them, because they were right together.

Q Both on the same shaft?

A No, not on the same shaft; one on the other shaft—one shaft here and the other shaft here ran the large cog-wheel.

Q You were facing it, were you?

A Yes.

Q And both the cog-wheels were right square in the center between the posts, in the center of the platform?

A He said he stood on the platform; of course it was here, he said (showing).

Q You were standing just as you are now, looking right at the center of those two cog-wheels, were you not?

A He didn't stand in front of them.

Q Well, they were both right in the center of the shaft, were they not, and right in the center of the platform?

A He says if you pull him around there he can't show you anything—he said he could not tell you just how he stood.

Q You answer my question now; that is what you are here for. I want to know whether the cog-wheels on these shafts were right in the center of the platform or not.

A No, there is no platform goes out there at all. He stood in the center of the platform—the platform was on the other side.

Q You were standing on the platform?

A Yes.

Q And the cog-wheel was right in the center of the shaft and you could stand right in front of it, could you not?

A One smaller one and one larger one turning in front of him.

Q How far was it from one post to the other?

A About four feet.

Q About four feet, was it, from one post to the other, where the bearings were attached?

A About four feet—it could not be more.

Q How far was it from the platform up to the shaft, or up to the wheels?

A About four feet.

Q About where on your body?

A About where he points to (showing).

Q The platform was four feet wide, was it?

A Well, about three feet wide, but there was no platform where the small wheel was.

Q How far towards you—you were standing on the side where you are now—what was the size of the platform on which you were standing up to this point (showing)?

A About three feet wide and about four or five feet long.

Q Now, you came up here on the day you were hurt and oiled the right bearing first, did you?

A One here and one here, he said—the shaft and that is

the first point he threw oil on (showing), and he came over here and he put some oil there (showing), and he reached over here to oil this one when it caught his arm and took his arm off.

Q You had oiled the one on the right-hand side, both bearings on both shafts?

A Yes, sir.

Q And then did you reach across from here to oil this bearing over there (showing)?

A There was no way to get past over there and he had to reach into here.

Q As I understand you, you oiled this bearing and then this one over on that side and then you came over on that side of the cog-wheels, did you?

A Yes.

Q Now, where were you standing?

A Yes, he oiled that one and then he held back his clothes, reached over and oiled this one.

Q So that you walked across the platform over to that side to oil the left bearing, nearest to you?

A He said how could he walk—he can't move around—there is no space to move around.

Q Didn't you say it was four feet across this platform?

A The shaft is four feet—he said how could there be a space—there is the motor and belts and all on that platform.

Q Where was the belt?

A On that side (showing).

Q I am asking you from the point here, from the bearing to the bearing on the left, what was the distance in between there on the platform?

A This is the track wheel—there is no platform.

Q What was it you were standing on? Isn't that a platform?

A About three feet, he said, putting all the machinery and all on that platform.

Q The machine was over in that direction, wasn't it? Where you were standing was not the platform free so that you could walk across it?

A There is no room to move around; he goes up on the

ladder and he stands right there and he has to stoop over there.

Q I want to know the distance from the platform where you were standing, from one side over to the other. How wide is it?

A About three feet.

Q And there was not anything to prevent a man from walking across there, was there?

A How could you move in there?

Q You answer my question.

A He said there is all boards nailed in there so that he could not go and walk on the platform.

Q I want to know what was on the platform to prevent your walking from one side of the platform to the other?

A The belt was there; there was only about three feet to stand and the belt on one side and as you come up the steps there was boards nailed.

Q Was there anything else but the belt which prevented your walking across from one side of the platform to the other?

A The motor and the belt and pipes.

Q Where was the motor with reference to the shaft, was it right underneath the shaft, or where?

A What motor?

Q I want to know what there was to prevent walking from one side of the platform to the other, except the belt—now what else was there?

A Nothing more than the boards nailed that he could not—

Q That was all, and then there was nothing except boards over on that side that prevented you from going along over there, was there?

A Just that the boards were nailed and the buckets came over there for the gravel.

Q How did this wheel revolve—towards you?

A Yes, sir, towards him.

Q Now, there was not any danger in oiling this bearing here after you had oiled the bearings on the right side—both of them—there was not any reason you could not oil this bearing without danger?

MR. MEYERS: May it please Your Honor, I think that Mr. McCord is going a little far when he asks a man who has proven his ignorance his reasons for doing certain things. He can ask him whether he could have gone there—he said, practically, what is the reason you could not do it safely?

THE COURT: Mr. McCord is cross-examining, and he has the right to test the ignorance or intelligence of the witness by his questions—the jury will judge whether he is ignorant or intelligent.

MR. MEYERS: (Addressing the interpreter) Tell him not to get excited, that he is all right among his friends.

MR. McCORD: I don't like that sort of a suggestion; I don't think it is proper for you to make it in the presence of the jury and the Court.

MR. MEYERS: I think any man would get nervous after awhile; I believe even you would.

MR. McCORD: I don't believe that is proper; you are impugning my cross-examination.

MR. MEYERS: Not a bit.

Q Now, I want to know when you oiled these bearings on the right-hand side, I will ask you what reason was there why you could not go across here and oil this bearing? I believe you said you did it.

A He could not go over there on that side anyway at all to oil this bearing at all. He answers this question every time that way.

Q I want to know where this shaft with the bearing here where the little cog-wheel is attached, the bearing on the left and the bearing on the right—and he looked right straight at it—I want to know whether he had any trouble with oiling that bearing?

A He doesn't know that it interfered with him any—he put the oil there and then reached over there to put the oil there.

Q You had no trouble in oiling that bearing on the shaft where the small cog-wheel was attached to—you had no trouble in oiling that bearing?

A He put the oil there and nothing happened, he said.

Q It was perfectly safe to put that oil in there, wasn't it?

A He don't know whether it was or not.

Q I am asking you now—it was perfectly safe, as you look at it now, for you to have put the oil in the bearing here on the left?

A He doesn't know—he doesn't know.

Q You could see that cog-wheel revolving, could you not?

A Sure he could see it.

Q You knew that if you got your hand on that cog-wheel you were going to get hurt, didn't you?

A He didn't know it—if he did he would not have gone up there for all America.

Q You knew that wheel was revolving or rolling very rapidly and if you got your hand in it you were going to get hurt, didn't you?

A He didn't know; if he knew he would have quit and went home.

Q You have worked around the other motor and had been working there about three weeks?

A Yes.

Q And you knew when the machinery is revolving and the wheel is revolving fast, you know very well, don't you, Mr. Melovich, that if you got your hand on that revolving wheel you are going to get hurt, or get your body on it?

A He knew nothing about it. On the machines where he worked the cog-wheels were covered up there and he knew nothing about it.

Q You had seen wheels revolving all your life and you worked as a brakeman on a train, didn't you?

A There is no gravel machine in the power house and he doesn't know about it.

Q Do you mean to tell the jury, or do you want them to believe, that you did not know and could not know whether there was any danger in coming in contact with a rapidly revolving shaft with cog-wheels on it?

A He does not know anything about it; he said he would rather have his hand today than all that machinery and things.

Q Do you tell the jury that you did not know, and did not know at the time you were hurt that you would get hurt if you got your hand tied up in a revolving wheel?

A He doesn't know—he didn't know. If he had known he would never have gone up there.

Q You know very well if you got in contact with a wagon wheel that is going fast—if you stick a stick in it you know it is going to hurt you, don't you?

A He never did anything like that.

Q You have described this machinery here with a great deal of accuracy; now, if it was safe to oil this bearing I want to know why it was not safe for you to oil that one across there (showing)?

A He said why wouldn't it, because the big cog-wheel was going in front of him, he says, sure it is.

Q Why did you try to avoid the cog-wheel?

A How can he get back there when he had to reach over there to oil it?

Q You didn't raise your hand or deliberately put your hand into this cog-wheel, did you?

A No, he didn't put it in there.

Q Why didn't you just reach across there—why did you pay any attention to the cog-wheel?

THE INTERPRETER: I will have to ask that question again. He is telling about something else.

A You can reach under—you can't reach around it, you have to reach over there that way.

Q Did you deliberately put your arm upon that cog-wheel?

A He said, why should I answer that—he said I told him once if I put my arm over there I would rather have my arm now than the whole of the United States.

Q Answer my question; whether you did on purpose put your hand in that wheel, that revolving cog-wheel?

A No, he didn't put his hand in there.

Q Why didn't you put your hand in there deliberately, if you didn't know the danger?

A Why should he put it in there; he said he was only oiling the cog-wheels and not the cans over there.

Q When that wheel was revolving you did not put your hand on it because you knew it was dangerous and you tried to avoid that revolving wheel, didn't you?

A He didn't know—he didn't know anything about it; if he knew he would not have went up there.

Q You knew that that wheel was dangerous, that revolving shaft was dangerous, and you tried to avoid it, didn't you?

A He said he didn't know—he would not have went up if he had knowed.

Q Never mind whether you would have gone up if you had known. I want to know if you did not try to avoid getting hurt on that wheel and tried to keep your clothes out of it.

A Nobody told him anything about it, and he does not know. How could he?

Q Why did you say just now that you pulled your clothes away so as not to get it caught on the wheel, if you did not know that it was dangerous?

A He said he didn't pull his clothes.

Q You said a moment ago in your testimony—in your testimony just now—when you came over here to oil this that you pulled your clothes away and reached over so as to keep off the wheel?

A It didn't catch him down at the hand—it caught him right there (showing).

Q Didn't you try to keep your clothes off the cog-wheel?

A He didn't have to—his jumper was tight fitting.

Q Didn't you try to keep your clothes away from the cog-wheel?

A He was not careful—he didn't know—he doesn't know anything about machinery.

Q You didn't pay any attention to it—you just went to work recklessly and let your jumper get loose and get caught in there deliberately, did you?

A No, just went up there and he oiled the box and went over in the corner and it caught his arm.

Q You could see this cog-wheel revolving, could you not?

A He could see it but not when it was going fast, something like the wind.

Q You didn't oil cog-wheels while they were in motion, did you?

A Two or three times he went up to oil it.

Q You didn't oil the cog-wheels—you oiled the bearings?

A No.

Q How long was this can? How long a neck did it have to it?

A About one foot long in all.

Q Did it have a crooked stem?

A Yes, sir, the spout on the end was straight.

Q What was the distance between those two bearings?

A He doesn't know—he didn't measure them.

Q About how far?

A He doesn't know. If he measured it he would know.

Q Give me your best judgment?

A There was a shaft here (showing) and a shaft here (showing).

Q How far between them?

A He doesn't know; he could not tell.

Q It was light there when you went up—you could see plainly?

A Yes, it was day time—he could see.

Q It was perfectly light there, wasn't it?

A You could see well; it was day time, although it was boarded and it made a dark shade on it; the lamps were there.

Q Why didn't you oil the cogs while the machine was in motion?

A You don't have to put the oil on the cog-wheel that goes around.

Q Do you mean to tell me that you didn't know that there was any danger—if you deliberately put your hand in that revolving wheel you thought it would not hurt you, did you?

A He doesn't know—no, he would not have done anything like that—he would not have.

Q I want to know whether you didn't know it was dangerous for you to deliberately put your hand in that wheel.

A No, he doesn't know anything about it.

Q Then you didn't think it was dangerous, did you?

A He doesn't know anything about it and didn't know.

Q Didn't you testify in the trial of this case the last time that you knew it was dangerous?

A He don't remember—he don't know that he said it.

Q Didn't you state in your former examination, the former

hearing of this case, that you would not have put your hand in that wheel for anything and you would not be fool enough to put the oil can in that revolving cog-wheel?

A Yes, he said he asked him and asked him and asked him and he said "I am not crazy enough to stick my hand in there."

Q You said you were not crazy enough to stick your hand in there—that was what you testified on the former trial?

A He said that he remembered this way, that he told me to tell the lawyer that anybody that had any sense would not put his hand in there.

Q That is it exactly, and because you had some sense you would not put your hand in it either, would you?

A I would not have gone up and he would not have put his hand in there if he knew it would have took his arm off.

Q And you would not be crazy enough to do that, as you said on the former trial, to put your oil can in that wheel?

A He didn't know; if he had known he would not have done it.

Q You will now say—you will not deny now, that you knew that it was dangerous to put your hand around that wheel or in it?

A He said he will tell you a thousand times over he didn't know there was any danger there.

Q You were not crazy enough to put your hands in that wheel and nobody else would be crazy enough to put his hands deliberately on those cogs revolving around.

A He said he is not crazy, exactly, but he said that is not his work and he knows nothing about it.

Q And the reason you would not be crazy enough to put your hand on that cog-wheel is because you knew it would hurt you if it did, wasn't it?

A He said no, he didn't know it—he told you a thousand times he didn't know it.

Q Why did you say you would not be crazy enough to put your hand on that revolving wheel, if you did not know that it was dangerous?

A He said the lawyer put the question before him that way: "Why didn't you put your hand in the wheel" and he said that he was not crazy enough to do a thing of that kind.

Q And the reason that you were not crazy enough to do a thing of that kind is because you knew you would get hurt if you did?

A He didn't know.

Q Ask him that again, and I want an answer to that question and tell him so, will you?

MR. MEYERS: Just a minute. The question in issue in this case is whether in oiling this machine it was dangerous, and Mr. Kerr asked him the same question a hundred times—

MR. McCORD: And I haven't got an answer yet.

THE COURT: I think you have dwelt upon it long enough, Mr. McCord.

MR. McCORD: I want an answer. He evades the question.

MR. MEYERS: He said he didn't know it was dangerous, and he told you a thousand times it was not dangerous.

THE COURT: After a witness has persisted in evading a question on cross-examination as many times as this witness has, you have the right to argue to the jury that because he evades it he is not a reliable witness. It affects the credibility of the witness, but there is no need of persisting and spending time on it to force him to answer a question that he doesn't want to answer.

MR. MEYERS: You did not mean to get it in the record and before the jury that this man was evading anything, did you?

THE COURT: The jury will judge of that. I am speaking of the general principle that when a witness evades and persists in evading a question on cross-examination, that that is an important fact for the jury to consider in weighing his evidence, in determining what degree of credibility to give to it.

MR. MEYERS: If Your Honor meant this witness, I would like an exception to that statement.

THE COURT: The reporter took down what I said, and you may have an exception to what I said.

Q Mr. Melovich, didn't you on the former trial of this case, in answer to the following question, make the following answer (reading):

"What did you mean a little while ago when you said to the jury that you knew better than to put your hands in there

when you were putting the oil on the cog-wheels," and didn't you answer that question as follows? "Any crazy man would know better."

A He says he didn't have to tell him he was crazy; he says that he had to go up there and oil this machine or oil this box—he knew he had to do it—he was told to do it.

Q You heard my question and I want to know, not what he is saying now, but whether or not he testified that way at the last trial—I want you to put it to him so that he will understand it—whether or not he so testified on the former trial of this case—whether he did or did not. You understand my question, do you?

THE INTERPRETER: Yes.

A He says that the lawyer asked him a hundred different times, or several different times, why didn't he put his hand in there and he said he told him he was not a crazy man.

Q Ask him to answer me yes or no—did he testify that any crazy man would know better than to put his hand in that cog-wheel?

A Well, he is answering it the same way I gave it to you before. I can't get him to say yes or no. I asked him to answer it yes or no.

MR. McCORD: I would like to have the Court instruct the interpreter to have the witness answer the question yes or no. Did or did he not so testify on the former trial? He persists in not doing so and I would like to have an answer to that question, because his testimony is here just as I have read it.

THE COURT: I will let the other interpreter interpret to him what I am going to say to him now.

THE OTHER INTERPRETER: I will try to.

THE COURT: Will you tell him that on cross-examination when the attorney opposed to him is asking him a direct question that he must not go on talking about everything else but must answer the question directly, and when he answers it—whether he did or did not so testify—he must say "yes" or must say "no." Now tell him that he is required to answer this question that Mr. McCord is asking him directly. He

must say "yes" if it is true and "no" if it is not true. Now ask the question—put the question to him.

Q What did you mean a little while ago when you said to the jury that you knew better than to put your hands in there where you were putting the oil on the cog-wheels, and your answer to it was: "Any crazy man would know better;" I want to know whether that question was asked him on the former trial, and whether his answer was: "Any crazy man would know better."

A Well, he is answering again. He says the lawyer got him so rattled he didn't know what he was saying, and I asked him—I told him again in answering the question to say yes or no, and he answered it the same way again, saying that the lawyer had asked him so many times that he got nervous, and he said "A crazy man would not do it."

Q Ask him if he answered the question that way again.

A He don't remember he said it.

MR. MEYERS: Just at that point was where Your Honor instructed Mr. Kerr: "I don't think you should dwell on that point any longer," and it was right when that question was asked in that manner.

THE COURT: Did he understand the question, Mr. David?

THE INTERPRETER, MR. DAVID: I think he did. I think he understood it pretty well. Maybe it could be put to him a little plainer.

MR. McCORD: Suppose you put to him this question—

THE COURT: You may ask him that same question.

MR. McCORD: (Handing transcript of former trial to the interpreter) There is the question right there—that question and the answer (pointing).

(Whereupon the question is put to the witness from the transcript, by the interpreter.)

A He said: "I didn't mean it that way."

Q Ask him if he said it.

A He said he didn't mean it that way, and he didn't answer whether he said it, except that he was telling the other lawyer not to ask him that many questions.

MR. MEYER: Perhaps, Your Honor, I would be perfectly

willing if Mr. McCord so wishes it, to allow this whole record to go into the record in this case.

THE COURT: Well, that does not serve the purpose. He is asking the questions on cross-examination to test the witness.

MR. MEYERS: I will be perfectly willing to have this all go into the record in this case.

THE COURT: So that the jury will judge about his manner of giving testimony, whether his testimony is going to prove his case. But you have dwelt long enough on it, Mr. McCord.

Q How did you put the oil on the cog-wheels when you oiled them?

A He never put it on the cog-wheels; he put it in the cans—in the boxes.

Q Did you ever oil the cogs at all?

A No, he didn't put any in there—he said the boss did that.

Q Didn't you testify in the former trial that you did put the oil on the cog-wheels as well as on the bearings?

A He doesn't remember if he did.

Q Well, did you or didn't you?

MR. MEYERS: If he doesn't remember, how can he tell?

Q Ask him now if he ever oiled the cogs on those wheels?

A The boss went on there and put skid grease on there himself.

Q Did you ever oil the cogs at any time?

A No.

Q How many times were you up there, Melovich?

A Three or four times before his arm was taken off.

Q How many days had you been oiling it?

A When Slim was there he was there six days, he said.

Q You were up there every day for three or four days, were you?

A No, he hadn't been up there all the time—just when they sent him up.

Q On how many different days were you up there?

A Well, every other day he would send me up, that is, he didn't go over there only just when he was sent up there.

Q How many different days was he up there—I don't mean how many times a day, but how many different days?

A He doesn't understand me when I ask him that question.

Q Didn't you have a conversation with Mr. Elmore and Mr. Sears and Mr. Roberts at the office of the company in which you stated that you had oiled that machine eight or ten times a day for seven or eight or ten days, or something like that?

THE INTERPRETER: I will have to ask him that again. He is going on to tell about some doctor taking him up to an office some place.

Q Ask him if he didn't have a conversation with Dr. Roberts and Mr. Sears and Mr. Elmore?

A Well, he says they had some men up there that didn't speak very plain in his language and he was a different nationality, but just in a broken way, and he asked him questions, but he was so sick and didn't feel well and he answered the questions and he didn't know what he was answering.

Q What you mean was that you took this man up there with you, didn't you?

A No, he found him there at the office.

Q Who was it—do you know?

A He doesn't know him.

Q Didn't Mr. Sears, the superintendent, offer to give you a job on several occasions? Just answer that yes or no.

A He said that when he got up there Mr. Sears told him there was Eli, a boss at the mine, to go to work and he would give him work and give him a pile of money.

Q I want you to answer the question yes or no. Did or did not Mr. Sears offer to employ you at your old job at the same salary? Answer that yes or no.

A Yes.

Q In this work you were doing in running this motor you simply had to use your head and turn the lever on—that was all you had to do except oil the motor?

A Well, he says that as long as there is two brakes that he has to use both hands.

Q You oiled your own motor, the one which you put in and had been running about three weeks, as you testified?

A Just in the boxes.

Q You oiled your machine, did you, at all times?

A Yes.

Q Was that motor like the motor that you were hurt on?

A No.

Q What was the difference between them?

A Altogether different.

Q Tell me what the difference was?

A Well, he says at the motor machine he could run that because it is just like running a street car. There is handles and he could run it easy; and another thing, he said, Mr. Savage covered this.

Q Were there any gears on the machine that you were running?

THE INTERPRETER: I am afraid I don't know how to ask him gears.

Q Any cog-wheels on your machine?

A Yes, sir, there was a cog-wheel and a small one, but they were covered.

Q Did you oil these?

A Yes, sir, in the box where it had to be oiled.

Q Did you oil the cogs themselves?

A When he stopped the motor then he would take and put the oil on.

Q Did you stop the motor?

A Yes.

Q Whenever you wanted to oil it then you stopped the motor, did you?

A It doesn't require oil on the motor, only when he starts to work at noon.

Q Did you ever oil that motor while it was running?

A No, sir, and it didn't need it.

Q Why didn't you oil it while it was running?

A It didn't need it and he didn't have time.

MR. McCORD: That is all.

RE-DIRECT EXAMINATION.

MR. MEYERS:

Q You made a statement just now that Savage covered something. Tell him to tell us what Savage covered.

MR. McCORD: I object to that unless it is something in connection with this machine.

MR. MEYERS: You asked him that.

MR. McCORD: I never asked him any such question. He volunteered that, but not in response to my question.

MR. MEYERS: I don't think the jury understood just what it was.

MR. McCORD: I never asked him any such question.

MR. MEYERS: You asked him a question that brought that answer out.

THE COURT: I will sustain the objection.

Q You said just now that you went up to the White Building and had a conversation with the doctor of Stone & Webster —the doctor and Mr. Elmore and somebody else. How did you come to be up there?

A Well now, he is answering—he said that when he was in the hospital that some one came in there to visit him from the company and brought him some papers to sign. I asked him why he came to go to the White Building and he starts in answering it that way.

Q Ask him how he came to go up to that meeting; whether anyone took him up there or not or whether he went up there in company or unaccompanied.

A The company's doctor came there and took him up from the hospital up to the White Building office.

Q When was that, with reference to the time he left the hospital?

A The same day that he left the hospital.

Q After he had this meeting he did not go back to the hospital?

A No.

Q Tell the jury just what happened in that meeting that they mentioned, between the doctor and Mr. Elmore; tell the jury just what happened?

A When he came up there that day he was taken up there by the doctor and when he got to the office Mr. Sears was there and Mr. Roberts and the doctor, and they asked him if he would like to go to work, and he said to them: "What can I do with one arm?" He says then that some one told him that Eli

wanted him to go back to work, that he would give him steady work, a good job, and give him something—give him some money.

Q Was the amount of money mentioned?

A Smith told him he would give him a few hundred dollars.

MR. MEYERS: That is all.

ELI MELOVICH, recalled in rebuttal, testified as follows:

MR. MEYERS:

Q Eli, Dr. Elmore has testified that he visited you in the hospital, and when he visited you at any of those times that he mentioned, state whether or not he said anything about settling the litigation, or anything of that kind or nature?

MR. McCORD: I object to that as not proper rebuttal. Dr. Elmore never said that, because I never asked him that.

MR. MEYERS: Dr. Elmore said that he never made any mention of any settlement in any of his visits.

MR. McCORD: I don't think I asked him that question. The only question I asked him was in regard to the conversation in the White Building.

MR. MEYERS: I said on any visits that the doctor made to him or when he saw him.

MR. McCORD: You said in the hospital, and you limited it to that one place, or I would have had no objection.

MR. MEYERS: I will change that question then to—during any visits of Dr. Elmore to you at any place?

MR. McCORD: I object to that question unless he limits it to the meeting in the White Building, to which Dr. Elmore testified that nothing was said about a settlement.

MR. MEYERS: Dr. Elmore stated that he never made any such statement and the testimony will show that.

THE COURT: The way to put an impeaching question is to refer the witness to the precise time and the persons present and ask him if the doctor did say or did not say those words, or words to that effect. This is an instance where you want to put leading questions to your own witness for the purpose of fixing the time, place and persons present.

Q Were you ever present at the White Building when Dr. Elmore and several other officers of the Stone & Webster Company were present also?

A Mr. Sears, Dr. Elmore and Mr. Smith.

Q How did you come to be there, Eli?

A The doctor came to the hospital and took him up there.

Q Did you tell the doctor you wanted to go up to the White Building?

A No, sir, he didn't tell him he wanted to go any place. The doctor said: "Come on—come up—the company wants to see you."

Q Tell him to tell the jury just what happened when he got up there.

A He said that when he went up there the doctor took him up and that when he came up to the office there were three or four men there and that there was some man that tried to talk the Slavonian language to him, but he could not understand it because it was a broken language of some other country that he spoke, and he asked him several questions and Mr. Sears told him that the superintendent Eli wanted him—called him to go back to work, and he said: "What I can do with one arm—I can't do so much with one arm," and Mr. Smith remarked that he would give him some money—a little pile of money, and to go back and he would have steady work.

MR. MEYERS: That is all.

WILLIAM SAVAGE, a witness produced on behalf of the plaintiff, testified:

That he had been working around different kinds of machinery for about thirty-five years and was familiar with various kinds of machinery and with machinery used in construction work.

Q Do you know whether the cog-wheels and machinery around the motor were guarded or not, Mr. Savage?

Objected to as irrelevant, incompetent and immaterial.

Objection overruled and question repeated. Exception taken and allowed.

A The one he was supposed to run?

Q Yes.

A Yes, they were guarded.

Q How do you know that?

A I guarded it myself.

Q What was your position at that time?

A At that time I was putting up that motor.

Objected to. Objection overruled and exception noted for defendant.

Q Mr. Savage, is it customary for companies to guard cogs of that sort?

A Well, it has been in all my cases.

MR. McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied. Defendant excepted and exception was allowed.

Q I will ask you to examine that picture (handing photograph marked Exhibit "A" to the witness) and state whether or not it would be possible for a man to oil the boxes around the cogs and the wheels without reaching over the wheels—as that machine is constructed there?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent. He said he never saw the machine and does not know about the connections and does not know how it is constructed, and does not know about the platform, and has not been there; and it is not a proper hypothetical question.

MR. MEYERS: He does know them.

THE COURT: I will overrule the objection. He can answer if he knows enough about it to answer it.

THE WITNESS: What is the question?

MR. McCORD: If you will stop picking your teeth we could hear you better.

THE WITNESS: I asked what the question was, as I can't hear half what you say. If you will pardon me, I don't want to be volunteering anything.

(Question repeated to witness.)

A Well, that is a question that is pretty hard to answer from the photograph, because I was never on the top of it and I don't see how I could.

Q You know nothing about the dimensions of that machine, you say?

A Only from looking at it.

Q Looking at it from where?

A From the track—that is, from underneath it.

Q Did you ever see them taking this machine down and putting it up?

A Yes.

Q State how that cog-wheel might be guarded to make it more safe, if it is possible to make it more safe than an unguarded wheel?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent.

(Objection overruled. Exception noted for defendant.)

Q How that wheel might be guarded to make it more safe, if it is possible?

A Well, they could have boxed in the big wheel as far out as the shaft and the sides of it, which would have made it more safe.

Q Speak out.

A I said they could box in the side and back of the gear wheel between the gallows frame, to make it more safe.

Q Would the change which you suggested in any way interfere with the working of the machinery?

MR. McCORD: I object to that as irrelevant, incompetent and immaterial.

(Objection overruled and exception noted for defendant.)

A None.

Q Mr. Savage, would it be sufficient—are you sufficiently familiar with that machine to state whether that platform could have been extended and built out in any way and changed without being interfered with by the machinery?

(Objected to as irrelevant, incompetent and immaterial. Objection overruled and exception noted for defendant.)

A I said yes.

Q Well, if you are familiar enough, will you state to the jury what might have been done to enable a person oiling those wheels to have gotten sufficiently close to the different boxes without reaching over any of them?

MR. McCORD: I object to that as irrelevant, incompetent and immaterial and it is not within the issues in this case, and the witness has not shown himself to be qualified to give any such opinion.

(Objection overruled. Exception noted for defendant.)

A Yes, sir, it could have been changed so as to get up closer to the boxing.

Q Mr. Savage, what change might have been made to have made it more safe?

A Well, there is two or three ways they could have changed it of course.

Q State to the Court and jury.

A One, they could have put another platform above that one so as he could have got handily at it, and they could have raised the one that was there a little bit and made it a little longer.

Q If you are familiar enough with that machine, state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cog-wheel any closer than they would be from the machine, as you know it?

(Objected to as incompetent, irrelevant and immaterial. Objection overruled and exception noted for defendant.)

A Yes, sir, they could have changed it so as to have got closer to it.

Q How would that have been done?

A By putting another platform above the one that was there or raising that one.

On cross-examination the witness Savage testified that he was not familiar with the dimensions of the machine or the platform or anything about it; that he never was upon the machine—just saw it from the ground, a distance of eighteen or twenty feet; that he never took any measurements and did not know how far the cog-wheel was above the platform. That it looked like it might be four or five feet high and the width of it was about four feet. That the two cog-wheels were right over the center of the platform.

Q And the two cog-wheels were right in the center, were they not?

A Well, yes, that is practically close to the center; they would be to one side of the center.

Q That is about four feet between the bearings and between the boards on either side, the belt on the one side and the buckets on the other, where the man would stand, there would be about a four foot opening there, or what was it?

A About twenty inches, or twenty-four.

Q What is that?

A About twenty or twenty-four inches—that is between the gallows frame.

Q Between the cog-wheels on either side would be about twenty-four inches?

A Well, the cog-wheels would be closer to one side than the other.

Q Do you know which side it was closer to?

A Well, it would naturally be closer to the side that the conveyors were on—in other words, the buckets.

Q Would it be the right side or the left side, looking toward the cog-wheel from where the man oiling it would be standing?

A Well, the belt on this one would be on the right side to a man standing on the platform, and the gear wheels would be practically close to the center, and the buckets on his left.

Q It would be practically in the center, wouldn't it?

A Yes, that is in the center of the whole gallows frame.

Q Leaving about two feet on either side between the bearings and the cog-wheels?

A Something like that, yes.

M. L. LORD, a witness produced on behalf of the plaintiff, testified as follows:

That he was a mechanical and electrical engineer and had had many years' experience in the handling of machinery of various kinds, and had designed a number of machines similar to the one in controversy. He was shown plaintiff's Exhibit "A," a photograph of the machine and premises, taken after the plaintiff came out of the hospital; stated that it was customary to place what are known as housings, generally a sheet-iron housing, over gears.

Q Just how is it constructed and what is the nature of it; tell the jury, Mr. Lord.

A A house is sheet-iron that is placed in this one over the top of the gears. It generally fits down close to the gears. It has to be determined for two purposes—it acts as a protection from—

MR. McCORD: I object to the witness stating the purpose, as not responsive to the question, and as irrelevant, incompetent and immaterial.

(Objection overruled. Exception noted for defendant.)

A The housing is placed there for two purposes; it is to protect the gears from the danger of anything getting into them and keeping dirt and stuff out, especially in this line of machinery, gravel and stone works; to prevent stone getting down into it, because there is considerable wear on the gears, and that is one of the principal reasons we placed it on there, it is protection against wear and danger of anything getting in there, because it is impossible with that housing over the gears for anything to drop in there.

Q Does the guarding or housing of those cogs interfere in any way with their efficiency as wheels?

MR. McCORD: I object to that as irrelevant, immaterial and incompetent. Objection overruled and exception noted for defendant.

A Not in the least.

On cross-examination the witness stated:

A I mean to say on the majority of plants which I have visited, of which I took note, has guards placed over the wheels —in other words, houses.

Q You mean in factories and mills?

A Yes.

Q And there all the machinery is guarded, in manufacturing plants, is it not?

A Well, take it generally.

Q That is, it is required to be guarded where it can be guarded, under the Factory Act as it exists in this state, in said manufacturing plants?

A Most always a housing is placed over gears where they turn down.

Q Prior to the time of the passage of the Factory Act a great deal of the cog-wheels and shafting was left unguarded, wasn't it, in the majority of cases around saw mills, and it was not guarded as a rule where it was open and where a man could see it—it was not customary prior to the passage of that act to guard machinery, even in saw mills and manufacturing plants, was it?

A Yes, I must say it was; most constructing engineers generally regard it as necessary.

Q But I sa—

A (Continuing)—and planned accordingly.

Q I say it was the general rule to guard it prior to that time, was it?

A I believe, according to my experience it was, yes.

Q You never saw one without the guards?

A Well, I have seen machines without guards, but I must say that the majority of them have guards or housing.

Q That is, those that are in permanent plants or in temporary plants?

A Well, that is a pretty hard question to decide. The majority of gravel plants are permanent—the majority of plants I visited are practically permanent, that is, they have been established all the way from five to fifteen or twenty years.

Q In a plant of this kind a man would have very little occasion to go up there, except to oil the machinery.

A Well, he would have to go up there for a good many purposes; he would have to go up there to oil the machinery and probably there would be more or less belt troubles that he would have to attend to.

Q He would not come in contact or come near this cog-wheel except in oiling this machinery, would he, as a rule?

A Yes, as a rule.

Q Sir?

A That is the rule, yes, sir.

Q You heard Mr. Savage say it was about four feet between the bearings, didn't you?

A I don't believe I paid any attention to his testimony.

Q Assuming that he said that, and the cog-wheel was right in the center, and that would leave two feet to either side for oiling purposes, now there would be no occasion for a man to go above there—

A Well, of course the shaft would take up a great deal of the space and would not leave much space for a man to get around.

Q I say, in front of it; if a man was standing in front of it and looking towards it, with the platform four or five feet wide for him to stand on, I say there would be no occasion for anybody else going near that machine except for the purpose of oiling it, or fixing the machinery, would there?

A Well, apparently it would not. Of course it depends a good deal on conditions. I did not pay particular attention to that lifting apparatus there. They might have some trouble due to the apparatus clogging at the point of discharge. It might be possible that a man would have to go up there to clear that sometimes.

MELI MELOVICH, called as a witness on behalf of plaintiff. He testified that plaintiff was injured upon the machine described in the complaint, on the 12th of July, 1910.

O. D. EDMONSON, a witness called on behalf of plaintiff testified:

That he had had some experience around machinery, but that he was a photographer and took the pictures introduced in evidence on the part of the plaintiff; that he took certain measurements of the machinery; that the width of the wheel was 6¾ inches and the diameter of the wheel was 3 feet; that the distance between the large cog-wheel and the driving wheel was 1 foot 7 inches; that the gravel machine was about 30 feet from the ground.

Thereupon the plaintiff rested and the defendant called as its first witness C. A. SEARS, who testified as follows:

That he was superintendent of construction of the Stone & Webster Engineering Corporation; that he was a mechanical

and electrical engineer; had been employed by the company for about two years and was acting in that capacity along about July 12, 1910, the day of the accident; that he was familiar with the gravel plant where plaintiff was injured; that it was constructed under his direction. Witness then identified defendant's Exhibit "1," which was offered in evidence without objection. He testified that the exhibit showed the measurements of the distance between the bearings and so on; that the drawing was taken from the machine in question.

Q I will ask you to indicate on that plan which you have there by the letter "A" the point where a man would stand who was oiling this machine, upon the platform. There are four bearings there, are they not?

A Yes.

Q Now, will you mark the four bearings, indicating by the letters "B," "C," "D" and "E" so that the jury may be able to know just where the bearings supporting the cog-wheels are located?

A I have marked them "B," "C," "D" and "E."

Defendant's Exhibit "2" introduced in evidence.

Q If a man was standing at the point, at the letter "A" which you have indicated, where would he be standing with reference to the revolving cog-wheels?

A The cog-wheels would be directly in front of him.

Q What is the width of the platform, or the size of the platform upon which a man would stand oiling the machine?

A It is probably about four feet wide and six feet long.

Q What is the distance between the bearings, Mr. Sears?

A It is given on the blue print. I cannot tell it from memory.

Q You can tell by examining the blue print?

A Yes. From center to center of the bearings is 21 inches.

Q Where are the cog-wheels located?

A They were located midway between.

Q An equal distance on each side, that is the distance from the cog-wheels over to the supports of the bearings was 21 inches?

A No. From the center of one bearing to the center of the other was 21 inches. The cog-wheels are located there. (Referring to Exhibit.)

Q What is the distance on the platform, four feet, you say?

A About four feet.

Q What is the distance between the bearings supporting the smaller cog-wheel and the one supporting the larger?

A About 14½ inches.

Q What is the diameter of the larger cog-wheel?

A 24 inches.

Q And the diameter of the smaller one?

A 5 inches.

Q About what height is the shaft supporting the cog-wheel from the platform?

A My remembrance is it was about to here on ordinary sized man.

Q Just above his breast?

A Yes.

Q About what height would it be? You can give your best judgment.

A I should say about four feet—a few inches over four feet.

Q In oiling that machine I will ask you, Mr. Sears, whether a man could, by the exercise of reasonable care, in your judgment, oil the bearings on both the shafts without coming in contact with the cog-wheels?

A I don't see any reason why he could not.

Q He would have on the right-hand side, between the cog-wheel and the timber there supporting the bearing, about 24 inches, wouldn't he?

A No.

Q How much would he have?

A About 10 inches.

Q How far on the other side?

A About the same.

Q And it is about 14½ inches between the two bearings of the two shafts?

A No, it is 21 inches between the centers of the two bearings, the bearings themselves being, probably, 4 inches long.

Q I will ask you Mr. Sears if you had any familiarity with other gravel plants similar to this one in operation in this state?

A Not exactly similar. No, this was an unusual place and required unusual methods of handling gravel.

Q Just tell the Court how the machine was constructed?

A This machine is located in a gravel pit, and the sand and gravel, or the material dumped from the pit, dumped into a depression known as the boot, and the material then was elevated by this machine to a height, I think in this case about 25 feet, and it was dumped over into a trough and mixed with water and run down a separator with screens, etc., so it would separate the sand from the gravel, and also wash it.

Q Have you seen other elevators—are you familiar with the means of operating other elevators of gravel plants and other elevators similar to this?

A Yes, sir.

Q I will ask you what the custom is in this community and the State of Washington, with reference to elevators in gravel plants, as to whether the bearings at this point where the plaintiff was injured should or should not be guarded—I am asking you if you know what the custom is?

A There are very few of them guarded.

Q What would be the custom then?

A On most of them that I have seen they are unguarded; usually in flouring mills and wheat elevators and so forth they are very seldom guarded.

Q As to whether there was anything on the platform to interfere with a man's vision in seeing the cog-wheels in operation?

A No, sir; no.

Q Do you know what time of day this accident occurred, Mr. Sears?

A It was in the afternoon, about 2 or 3 o'clock if I recollect it right.

Q I will ask you whether there was any covering to this building—or was it a building?

A It just had a shed over it, just to protect the motor from the rain.

Q How was it operated?

A By an electric motor.

Q Where did you get the power?

A From the Seattle-Tacoma Power Company.

Q Do you know where any of the other employes of the company that were present at the time of this accident are now?

A I was not at the accident so I do not know who was there.

Q How long have you known the plaintiff?

A I noticed him on the works probably two or three weeks before the accident; maybe longer, maybe a month or six weeks before the accident.

Q Do you know anything about what position he occupied?

A No, I do not. I remember noticing him and having my superintendent speak of him as an unusually bright man, and that he was advancing him, both him and his brother and a couple of cousins, I understand. One of his brothers is still in the employ of the company.

The witness further testified that after the accident the plaintiff stated that he oiled a number of times, a number of days and a number of times a day, but that he did not remember the exact number of times or days.

The witness further testified that he offered the plaintiff after he left the hospital the same place that he had held before at the same wages and that there was nothing to prevent a man with one arm from operating the machinery.

Q (Mr. Meyers) Did you, on the occasion of the former trial, Mr. Sears, make a statement in answer to a question of this sort: "So that in oiling the bearing farthest away from you, what would be the distance he would be required to reach with his oil? A About 18 or 20 inches?" I think you just made the statement that it was 14½. I just wanted to know whether or not you made that statement?

A Well, those distances I am giving you are from memory and approximately. I might vary 3 or 4 or 5 inches, and maybe 6 inches in giving my testimony.

Q And did you on the occasion of the former trial, in response to this question: "Q How close to it, Mr. Sears—close enough so that he could see it? A Oh, yes, probably

50 or 60 feet. That is, the place where the men would pass in proximity to the gravel machine. You just now said 10 or 15 feet. Did you make that statement?

A Well, I would like to know the question.

Q (Reading) "Q How close to it Mr. Sears—close enough so he could see it?

A Oh, yes. Probably 50 or 60 feet.

On re-direct examination the witness further testified:

Q Mr. Sears, a man would have to reach how far, did you say standing up in front of the cog-wheel on the one side or the other, how far would he have to reach over to oil the farthest bearing—the bearing supporting the big cog-wheel?

A I suppose it would be 15 or 16 inches.

Q And what was the usual and ordinary length of the can that was used in performing that duty? Whatever the can was —what is the length of the can that is ordinarily used out there?

A Well, we had cans from the small sizes to the large ones, and I do not know what can he was using there.

Q You do not remember what it was. Assuming that there was a 12 inch can used, including the stem, I will ask you is there any reason that occurs to you why a man of fair average intelligence could not oil that bearing without coming in contact with the moving wheel?

A No, there is no reason that I know of.

Q A man with his eyesight unimpaired could see the danger as well as a college graduate, could he not?

A I should think so—yes.

DAVID ROBERTS, a witness on behalf of defendant, testified:

That the plaintiff was asked by him, after he left the hospital, how many times he had oiled the machinery. That he stated he had oiled it for a period of twenty days about ten times a day. That the plaintiff could speak English very brokenly, and that he was offered a position after he left the

hospital at the same wages as he had earned before the accident, and that he was perfectly capable of performing the same work.

JOHN H. BERRIAN, a witness for the defendant, testified:

That he was engaged in designing and constructing elevators; that it was not customary in the State of Washington to guard bearings and cog-wheels in gravel elevators or other elevators; that he does not put those machines up but just sells them.

The plaintiff in rebuttal denied the conversations to the effect that he had oiled the machinery in question for a period of about twenty days and a number of times a day.

DR. BRUCE ELMORE, a witness on behalf of the defendant, testified:

That he had been a surgeon for about ten years; was a graduate of Columbia University; that he was the first medical attendant upon the plaintiff after the accident.

Q What did you do with him after you found him?

A I knew the nature of the injury, that is, it had been telephoned down, so I at once—with my assistants—prepared him and examined the arm and found that it was almost completely severed; there was practically nothing left but a little skin that held the arm to the shoulder, so I did a complete amputation a few inches below the joint.

Q How far below the shoulder joint?

A I think it is about two inches of bone that is left. I can only state from memory.

The witness testified further that there were a number of abrasions, not many and not severe on the face, head and breast; that he had complete charge of the plaintiff from that time on; that he was present at the meeting between Mr. Sears, Mr. Roberts and plaintiff in the White Building; that he engaged in the conversation. Upon cross-examination the witness testified as follows:

Q (Mr. Meyers) Doctor, in the former trial you were asked this question: (Reading) "Q From your experience as a physician and surgeon and having performed that operation and treated the plaintiff until August, what would you say as to whether there would be any ill results following from the loss of that arm, other than the loss of the arm itself? Any constitutional injuries resulting from it? A In very few cases would there be any." Now, were you asked that question and did you give that answer?

A I presume so.

Q And were you asked this question: (Reading) "Q Doctor, you would not say that Eli Melovich here had not suffered any pains in his chest or had any ill effects so far as that would be concerned, in coming in contact with the cogs, would you? A I don't understand the question; he had pain, certainly." And you were asked this question: (Reading) "Doctor, I show you a scar here—is that approximately where the cut or abrasion you mentioned was? A Why, I think so—I know it was on the face." Did you make that statement?

A I presume I did.

Q And did you give this testimony: (Reading) "Q There was considerable blood flowing from that wound, was there not? A Oh, yes." Did you make that answer?

A I remember saying there was blood all over.

Q "Considerable blood flowing from his arm and also his face? A Why, he was covered with blood." Did you make that answer?

A Yes.

Thereupon, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions, and prays that the same may be settled, allowed, signed and certified by the Judge who tried the cause, as provided by law.

KERR & McCORD,
Attorneys for Defendant.

Indorsed: Defendant's Proposed Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, May 22, 1912. A. W. Engle, Clerk. By S., Deputy.

United States Circuit Court, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION,
Defendant.

No. 1934.

Delivered Nov. 6, 1911.

ORAL DECISION ON MOTION FOR JUDGMENT *NON OBSTANTE VEREDICTO* AND FOR A NEW TRIAL.

This is a case in which the jury rendered a verdict for more than $12,000 damages to a man who, while working in plain view and conscious knowledge of the operation of unguarded cogs suffered himself to get in contact with the cogs and lost an arm and was scratched and injured otherwise. As I indicated on the trial, the rules of law which precludes a recovery by a workman from his employer for injuries suffered in consequence of exposure to a known danger and in consequence of his own contributory negligence, should have entitled the defendant to a non-suit or directed verdict, but the decisions so often repeated by the Circuit Court of Appeals for the Ninth Circuit requiring personal injury cases to be determined by juries, constrained me to submit the case to the jury. Whilst it is true that these cases must be decided by juries, nevertheless when a verdict is rendered which in the mind of the trial judge is unconscionable and contrary to the law, the Court in the exercise of a sound discretion can at least require that two juries shall be given an opportunity to pass on the case before the decision becomes final. I have a consciousness and did have before the hearing of the motion for a new trial in this case, that the verdict is unjust and that is the foundation of this decision granting a new trial; the superstructure is that—I find that the case was submitted to the jury under an erroneous instruction. The Court read to the jury an instruction requested by the plaintiff's attorney, containing an error,

by it the jury were instructed in effect that they could consider *any negligence* on the part of the defendant which the evidence proved. This was materially erroneous and at variance with other instructions given requiring the jury to decide the issue as to the particular negligence specified in the complaint. Counsel for the plaintiff wrote that instruction and the Court read it to the jury, and counsel for the defense, alert for the protection of the defendant's rights, failed to take notice of that error at the time. I can only explain it on the theory that from weariness my mind was not acute as it should have been at that time. Now, although it was not excepted to at the time it is a matter that appeals to my discretion and I believe that justice requires the granting of a new trial so that the case may be again submitted to a jury under instructions free from error. The defendant's motion for a judgment *non obstante* is denied and the motion for a new trial is granted.

C. H. HANFORD,
United States District Judge.

Indorsed: Oral Decision on Motion for Judgment *Non Obstante Veredicto* and for a New Trial. Filed in the U. S. District Court, Western Dist. of Washington, June 22, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

No. 1394.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, STONE & WEBSTER ENGINEERING CORPORATION, a Corporation, as principal, and NATIONAL SURETY COM-

PANY as surety, are held and firmly bound unto Eli Melovich, plaintiff above named, in the sum of Six thousand and no/100 Dollars ($6,000.00) to be paid to the said Eli Melovich, his executors, administrators and assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this the 8th day of June, A. D. 1912.

WHEREAS, defendant above named has sued out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in the above named Court in favor of the plaintiff and against the defendant in the sum of $4,262.00 and costs to be taxed at $.....

NOW THEREFORE, the condition of this obligation is such that the above named defendant shall prosecute said Writ of Error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise shall be and remain in full force, virtue and effect.

WITNESS our seals and names hereto affixed the day and year first above mentioned.

STONE & WEBSTER ENGINEERING CORPORATION,
By KERR & McCORD,
Its Attorneys.

NATIONAL SURETY COMPANY,
(Seal) By M. H. ARNOLD,
Resident Vice-President.

Attest: GEO. W. ALLEN,
Resident Assistant Secretary.

Service of the foregoing bond is hereby accepted this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Approved June 10, 1912.

C. H. HANFORD, Judge.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

COURT'S ORDER AND STATEMENTS.

This matter coming on for hearing this 30th day of October, 1911, after the motion had been argued by Herbert W. Meyers, attorney for plaintiff, and Kerr & McCord, for defendant, and the Court being duly advised, makes the following statements and order:

"A granting or refusing to grant a motion for a new trial is a matter in the sound discretion of the Court. I would not assume to grant a motion for a new trial where there is no legal ground, but this case on its merits appeals to the discretion of the Court. I think the motion should be granted. Now there is legal ground shown by this motion in this, that by the instructions given there were errors in the manner in which the case was submitted to the jury. The Court did intend to instruct the jury that it was necessary to find specifically that the negligence charged in the complaint had been proved. The Court did so instruct the jury, but that was inconsistent with the other instruction given, to find for the plaintiff if the evidence proved any negligence. Now that word "any" is especially important when considered in connection with the arguments, for the argument took pretty wide scope and counsel labored with the jury to convince them that the defendant was guilty of wrongdoing towards this plaintiff by putting him in a position of peril, insisting that he was exposed there to extraordinary dangers that were not charged in the complaint, and when the jury heard the Court say "any negligence," they may have thought that they were justified in rendering a verdict on

general principles against the defendant, and that would seem to be indicated in the amount of the verdict they rendered. The plaintiff appeared here on the witness stand as an able-bodied, robust, healthy man—he lost an arm, it is true, but in keeping with other cases in which verdicts have fixed the amount of damages, $12,000 or $12,500, I have forgotten the exact amount, is about five times as much as usually has been considered reasonable compensation for the loss of an arm, if a man is otherwise physically an able-bodied person. I think this verdict is an unjust verdict and there is legal grounds for setting it aside and the Court grants the motion for a new trial.

C. H. HANFORD, Judge.

Indorsed: Court's Order and Statements. Filed in the U. S. District Court, Western Dist. of Washington. June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

PETITION FOR WRIT OF ERROR.

The above-named defendant, Stone & Webster Engineering Corporation, a corporation, feeling itself aggrieved by the verdict of the jury and the judgment entered against it on the 15th day of February, A. D. 1912, in said action, comes now by its attorneys and petitions this Court for an order allowing it to prosecute a Writ of Error to the Honorable Circuit Court of Appeals for the Ninth Circuit, under and in accordance with the laws of the United States in that behalf made and pro-

vided, and that an order be made fixing the amount of security which defendant shall give and furnish upon said Writ of Error, conditioned as required by law as in cases where supersedas and stay of execution are desired; and that upon giving such security all further proceedings in the above-entitled Court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

KERR & McCORD,
Attorneys for Defendant.

Service of the foregoing Petition for Writ of Error is hereby accepted, this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff.*

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Defendant.*

No. 1934.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

The defendant having this day filed its petition for a Writ of Error from the judgment entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, all in due time, and praying that an

order be made fixing the amount of security which defendant shall furnish on said Writ of Error, and that upon the giving of said security all proceedings in this Court be stayed pending the determination of said Writ of Error; it is hereby

ORDERED That a Writ of Error is hereby allowed to have said judgment reviewed in the United States Circuit Court of Appeals for the Ninth Circuit; and it is further

ORDERED That upon the defendant, Stone & Webster Engineering Corporation, a corporation, filing with the Clerk of this Court a good and sufficient Bond, in the sum of Six Thousand Dollars ($6,000.00) to the affect that if the said defendant, Stone & Webster Engineering Corporation, shall prosecute the said Writ of Error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; otherwise to remain in full force and virtue. Said bond to be approved by the Court, and all further proceedings in this Court be and are hereby suspended and stayed until the determination of the said Writ of Error by the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Seattle, Washington, this the 8th day of June, A. D. 1912.

C. H. HANFORD, Judge.

Service of the foregoing Order Allowing Writ of Error and Fixing Amount of Supersedeas Bond is hereby accepted this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

ASSIGNMENT OF ERRRORS.

Comes now the defendant Stone & Webster Engineering Corporation, a corporation, and files the following assignment of the errors upon which it will rely on the prosecution of its Writ of Error in the above-entitled cause.

I.

That the Court erred in refusing to sustain defendant's objection to certain testimony of the plaintiff. The following question was propounded to William Savage, a witness for the plaintiff:

Q Do you know whether the cog-wheels and machinery around the motor were guarded or not, Mr. Savage?

To this question the defendant objected on the ground that it was immaterial. The Court overruled defendant's objection, to which ruling defendant excepted and exception was allowed.

II.

The Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

Q I show you a picture of a machine, and I will ask you to state to the jury whether it is customary for companies for whom you have been employed in the past operating machines that you have seen, to guard cog-wheels of that sort?

MR. McCORD: I object to that as irrelevant, immaterial, incompetent and particularly, Your Honor, in view of the law

as it exists now; under the statutes of this State and since the Factory Act is passed, machinery in factories and machinery plants are required to be guarded. This case does not come within that act and counsel is not proceeding upon that theory, and what would be customary in a factory or a sawmill or a flour mill has no application to an isolated machine out in the open, which is intended only for temporary purposes. I do not think the question is proper.

THE COURT: If the Factory Act were being invoked here I should consider this question material, but as it is not, I think it is competent for a witness who is acquainted with machinery to testify what is usual and customary in the construction of that kind of machinery.

MR. McCORD: I object to it on the further ground that it is not a proper hypothetical question as the witness is not shown to have any knowledge on the subject whatever. He said he had not seen this machine and had not examined it and did not know anything about it except by passing by.

The objection was overruled and to the ruling of the Court exception was taken and allowed.

Q Mr. Savage, is it customary for companies to guard cogs of that sort?

A Well, it has been in all my cases.

MR. McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied. To this ruling the defendant excepted and exception was allowed.

III.

That the Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

Q Mr. Savage, what change might have been made to make it more safe?

A Well, there is two or three ways they could have changed it, of course.

Q State to the Court and jury.

A One, they could have put another platform above that one so as he could have got handily at it, and they could have

raised the one that was there a little bit and made it a little longer.

Q If you are familiar enough with the machine, state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cog-wheel any closer than they would be from the machine as you know it, by any change that might be made on that machine? to which question the defendant objected on the ground that it was irrelevant, incompetent and immaterial. The Court overruled the objection, to which ruling exception was duly taken and allowed.

A Yes, sir, they could have changed it so as to have got closer to it.

Q How would that have been done?

A By putting another platform above the one that was there or raising that one.

IV.

That the Court erred in refusing, at the conclusion of the testimony, defendant's motion for a directed verdict in favor of the defendant. To the ruling of the Court denying defendant's motion for a directed verdict the defendant duly excepted, and exception was allowed.

The following proceedings were taken upon said motion:

MR. McCORD: I now move the Court to take the case from the jury and to direct the jury to bring in a verdict in favor of the defendant in this action, for the reason that upon the entire testimony the plaintiff has entirely failed to make out a case of negligence against the defendant. I do not care to argue the matter at any length; I simply want to call attention to my view of the matter, that the plaintiff, while he was injured, was working in a place where the danger of the machine was open, obvious and apparent to him. He has shown himself to be a man of ordinary understanding and with unimpaired eyesight and he could see this machine and he could see its danger and appreciate it and knew that if he put his hand in contact with it or allowed his clothes to come in contact with the revolving cogs he would be drawn into it and be injured and hurt.

After argument of the motion to the Court the Court ruled as follows:

THE COURT: I consider that it is expedient for the jury to decide this case. I shall deny the motion.

To this ruling the defendant excepted and exception was allowed.

V.

That the Court erred in denying defendant's motion for a new trial, to which ruling of the Court the defendant excepted and exception was allowed.

WHEREFORE the said defendant, plaintiff in error, prays that the judgment of the said trial Court be reversed and that said District Court of the United States for the Western District of Washington, Northern Division, be directed to grant a new trial of said cause.

KERR & McCORD,
Attorneys for Defendant.

Service of the foregoing Assignment of Errors is hereby accepted this 7th day of June, 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.
No. 1934.

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the above-entitled Court:

You will please prepare a transcript of the complete record in this cause to be filed in the Court of Appeals for the Ninth Judicial Circuit under the appeal heretofore perfected to said Court and include in said transcript all of the pleadings, proceedings and papers on file herein. Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and on file in the office of the Clerk of the said Circuit Court of Appeals at San Francisco, before the 8th day of July, 1912.

KERR & McCORD,
Solicitors for Appellant.

Indorsed: Praecipe for Record on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, June 12, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ELI MELOVICH,
Plaintiff and Defendant in Error,
vs.
STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant and Plaintiff in Error.
No. 1934.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, A. W. Engle, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 230 printed pages, numbered from 1 to 230, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause and the entire record as the same remain of record and on file in the office of the Clerk of said Court, save and excepting Plaintiff's Exhibits A, B-1, B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10, B-11, B-12, B-13, and Defendant's Exhibits 1, 2 and 3, separately certified of even date herewith, and transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the record upon appeal in this cause, said exhibits being transmitted pursuant to the order of the District Court made in the said cause July 1, 1912, a copy of which order will be found on page 149 of said record, and that the same constitutes the record on appeal from the Order, Judgment and Decree of the District Court of the United States, for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit in said cause.

I further certify that I hereto attach and herewith transmit the original Citation and Writ of Error issued in this cause.

I further certify that the cost of preparing and certifying

the foregoing return to Writ of Error is the sum of Three Hundred and Fifty-five Dollars and Seventy-five Cents ($355.75), and that the said sum has been paid to me by Messrs. Kerr & McCord, Attorneys for Defendant and Plaintiff in Error.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 15th day of July, 1912.

A. W. ENGLE, Clerk.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH, *Plaintiff,* vs. STONE & WESTER ENGINEERING CORPORATION, a corporation, *Defendant.*	No. 1934. Citation in Error.

The President of the United States, to Eli Melovich, and Herbert W. Meyers, his Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, wherein you are Plaintiff and Defendant in Error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 8th day of June, in the year of our Lord one thousand nine hundred and twelve.

C. H. HANFORD, Judge.

Attest my hand and the seal of the United States District Court for the Western District of Washington, Northern Division, at the Clerk's office at Seattle, Washington, the day and year last above written.

(Seal) A. W. ENGLE,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

Service of the foregoing Citation in Error acknowledged this the 7th day of June, A. D. 1912.

HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: No. 1934. In the District Court of the United States for the Western District of Washington, Northern Division. Eli Melovich, Plaintiff, vs. Stone & Webster Engineering Corporation, a corporation, Defendant. Citation in Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy. Kerr & McCord, 1309-16 Hoge Building, Seattle, Wash., Attorneys for Defendant.

United States District Court, Western District of Washington. Northern Division.

ELI MELOVICH,

vs.

STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Defendant.

WRIT OF ERROR.

The President of the United States to the Honorable, the Judge of the District Court for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings and also in the rendition of the judgment upon a plea which is in the said Court

before you, or some of you, between Eli Melovich, the Plaintiff and the Defendant in Error, and Stone & Webster Engineering Corporation, a corporation, Defendant and Plaintiff in Error, manifest error hath happened, to the great prejudice of the said Stone & Webster Engineering Corporation, Defendant and Plaintiff in Error, as by its complaint and assignment of errors appears:

We, being willing that error, if any there be, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 8th day of July, next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this the 8th day of June, in the year of our Lord one thousand nine hundred and twelve.

(Seal) A. W. ENGLE,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

United States of America,
Western District of Washington—ss.

We hereby acknowledge receipt of a true and correct copy of the foregoing Writ of Error and acknowledge service of said Writ of Error by the receipt of a copy thereof.

ELI MELOVICH,
By HERBERT W. MEYERS, His Attorney.
HERBERT W. MEYERS,
Attorney for Plaintiff.

Indorsed: No. 1934. In the District Court of the United States for the Western District of Washington, Northern Division. Eli Melovich, Plaintiff, vs. Stone & Webster Engineering Corporation, a corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy. Kerr & McCord, 1309-16 Hoge Building, Seattle, Wash., Attorneys for Defendant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Plaintiff in Error,* vs. ELI MELOVICH, *Defendent in Error.*	No.

Brief of Plaintiff in Error

KERR & McCORD,
Attorneys for Plaintiff in Error.

Hoge Building
Seattle, Washington

Press of Pliny L. Allen

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation,
Plaintiff in Error,

vs.

ELI MELOVICH,
Defendent in Error.

No.

Brief of Plaintiff in Error

KERR & McCORD,
Attorneys for Plaintiff in Error.

Hoge Building
Seattle, Washington

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Plaintiff in Error,* vs. ELI MELOVICH, *Defendant in Error.*	No.

Brief of Plaintiff in Error

STATEMENT

We think it will be more convenient and less confusing to refer in this brief to the plaintiff in error as the "defendant" and to the defendant in error as the "plaintiff."

The plaintiff was injured on the 12th day of July, 1910, at Snoqualmie Falls, King County, Washington, by having his arm caught within re-

volving cog wheels used in operating an elevator for carrying gravel from a pit to a gravel washing machine, situated about twenty-five feet above the ground. At the time of the injury plaintiff was engaged in oiling the bearings of the shafts operating the cog wheels in said gravel washing machine or structure. The gravel carrying elevator was furnished power by an electric motor situated on the ground about twenty-five feet below the revolving cog wheels, upon which the injury occurred. Plaintiff had been employed by the defendant for some weeks prior to the injury and his duties consisted in operating a similar electric motor located a short distance from the gravel washing machine, and he had also been employed as a brakesman in the operation of electric cars upon a railroad. The revolving cog wheels, where the injury occurred, as before stated, were located about twenty-five feet above the ground upon which the washing machine stood. Immediately beneath the cog wheels was a platform about four feet wide and about six feet in length. On either side of this platform were timbers and supports about four feet above the platform or staging. Across the platform two shafts extended, resting upon said timbers or sup-

ports. The bearings of the two shaftings rested upon said timbers or supports about four feet above the platform. Upon each shaft were two cog wheels, one a small and the other a large wheel. The smaller cog wheel was about five inches in diameter and the larger cog wheel about twenty-four inches in diameter, and the cogs interlaced. The cog wheels and bearings were located at one end of the platform. The larger cog wheel was on the outer shafting and the smaller cog wheel on the inner shafting. In oiling the bearings of the shaftings, the oiler stood upon the platform facing the cog wheels, which revolved toward the oiler, and the cog wheels were about four feet upon the platform, upon which the oiler stood. The space between the timbers above the platform and on a level with the cog wheels was about three feet. The oiler used a can with a hooked stem from twelve to eighteen inches in length. The accident occurred in the afternoon of the aforementioned date, and it was perfectly light at the place where the injury occurred, and all of the machinery, including the shaftings and the cog wheels, were visible to any one in the possession of ordinary vision and eyesight. The plaintiff oiled the bearings on his right

hand, facing the revolving cog wheels, without injury, and after the right bearings had been oiled, he undertook to oil the bearings on the left side of the revolving cog wheels, and in doing so his clothing was caught in the revolving cog wheels and his arm drawn therein and injured to such an extent that it required amputation. The plaintiff had oiled the bearings of the shaftings supporting the cog wheels on several occasions prior to the date of the injury and on several days prior to that time.

Two grounds for negligence were charged in the complaint. The first, that there was a failure on the part of the defendant to furnish the plaintiff a safe place in which to work; second, the failure on the part of the defendant to provide and maintain reasonable safeguards for the cogs, shafts and gearings.

Through some inadvertence or for some reason all of the papers filed in the action below had been incorporated in the printed transcript, but all that portion of the printed transcript between pages 37 and 142, inclusive, is wholly immaterial to any of the issues involved upon this appeal, and should

never have been incorporated in the transcript, as all of such proceedings related to the first trial of this cause in the Court below. After the first trial of the case, a new trial was granted, and the second trial occurred on the 20th day of December, 1911, and a verdict on December 22nd, 1911, for $4,262.00, was returned in favor of the plaintiff and against the defendant, and judgment entered thereon.

The cause went to trial the second time upon the issues made up by the second amended complaint (Transcript, page 144), the answer (Trascript, page 32) and the reply (Transcript, page 38). The material allegations of the second amended complaint are as follows:

I.

"That the defendant, on the 12th day of July, 1910, and prior thereto, operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: A concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small buildings, and a large building or structure some sixty (60) feet in height, wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery,

which said establishment was used by the defendant in the production and manufacture of a mercantile substance or commodity known as concrete.

II.

That the buildings were all of a permanent nature and a part of the concrete manufacturing plant maintained by defendant company in manufacturing concrete for the Snoqualmie Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and with which cogs and gears the employes of the defendant were liable to come in contact, while in the performance of their duty as such employes, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employes therefrom, and without interfering with the efficiency of said machinery by so guarding.

IV.

That the defendant, on or about the said date and prior thereto, failed and neglected to provide a safe place in which for plaintiff to work and reasonable guards for the said cogs and gears were wholly unprotected.

V.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in and about said factory or mill, and that on said date plaintiff was ordered by the foreman or superintendent acting for the defendant corporation to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's direction as aforesaid; he came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have and did have his said right arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of his said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three-inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pain in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physicians believe to be the result of internal in-

juries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machinery aforementioned; that this work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely, on or about July 6th, 1910, plaintiff's former boss or head, the engineer aforementioned, was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the engineer aforementioned.

Plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had, according to instructions, done said oiling about four or five times, and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery.

Plaintiff, at the time of said injury, was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VI.

That the aforesaid injuries to the plaintiff were not due to any carelessness, fault or negligence of his own, but were due to and occasioned by the indifference, carelessness and gross negligence of the defendant corporation. That the carelessness and negligence aforesaid consisted in failing to provide

a safe place for plaintiff to work in and to provide and maintain reasonable safeguards for the aforesaid cogs, shafts and gearings.

VIII.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three Dollars ($3.00) per day, and by reason of this accident he had lost in wages approximately Two Hundred Sixty-two Dollars ($262.00) up to the time of filing his original complaint.

IX.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand Dollars ($12,000).

The answer of the defendant denies generally the allegations of the second amended complaint, and by way of affirmative defense the defendant set up assumption of risk and contributory negligence on the part of plaintiff. The affirmative defenses pleaded by the defendant are as follows:

"That on, to-wit, July 12th, 1910, this defendant was engaged in the construction of a concrete building situated on the northeasterly side of Snoqualmie River and immediately below Snoqualmie Falls; that situated in a northeasterly direction from said building and about nine hundred feet distant therefrom was a gravel pit, and located about twenty-five feet above the gravel pit was a tramway to which the said gravel was elevated and down the slope of which it was carried by water, which washed the dirt out of the gravel, and said gravel was deposited in bunkers from which it was removed to a concrete mixer at the place said con-

crete power house was being constructed; that at the top of said tramway and immediately above said gravel pit was situated a lift or elevator, and that the gravel was elevated from a point about twenty-five feet below said lift and by bucket running on an endless chain; that this endless chain was operated by said elevator, in the construction of which a set of cogs were used; that this elevator was operated by electric power, and that for a period of about three weeks prior to the happening of the accident to the plaintiff, he was the motorman employed for the purpose of and engaged in the operating of said elevator, and it was his duty as motorman, not only to operate said elevator, but to keep the shafting, bearings and parts thereof oiled and in running order; that the cog wheels used in said elevator were in plain and open view and that the danger of injury to the plaintiff should he allow the sleeve of his jumper to be caught therein was open, apparent and manifest and well known to the plaintiff; that the plaintiff had entire control of said elevator and that it was not necessary for him to have oiled the shafting about where the cogs were located while said elevator was in operation; that if any danger there was in the oiling of the shafting about the cogs, the plaintiff could have stopped said elevator and oiled any of the bearings without any danger to him whatsoever. That said elevator was an isolated piece of machinery, not connected in any manner with any operating factory or manufacturing plant, but was used as aforesaid solely and exclusively for the purpose of elevating the gravel for the purpose of washing the same and allowing the same to descend along the decline of said tramway for use in the making of concrete for the construction of said power house building. That the manner and

method of operating said elevator and the condition thereof and the risk and danger, if any such risk and danger there were incident to the operation of the same, were naturally incident thereto, and were all open, apparent and fully understood and appreciated by the plaintiff, and were assumed by him as a part of his employment.

For a further, separate and second affirmative defense to the matters and things alleged in the amended complaint, the defendant repeats the allegations contained in the first affirmative defense, and further alleges that if any injury or damage was sustained by the plaintiff at the time of his alleged injury set forth in his complaint and in his amended complaint, the same was caused and contributed to solely by the careless and negligent acts and conduct of the plaintiff himself, and was not caused or contributed to by any careless or negligent acts or conduct on the part of this answering defendant, its agents or employes whatsoever."

Transcript, pages 33, 34 and 35.

The reply of the plaintiff denies the affirmative allegations in defendant's answer. (Transcript, page 38.)

After the verdict was returned and within the time allowed by law the defendant filed a motion for a new trial. (Transcript, page 150.) Judgment was thereafter entered on the 15th day of February, 1912, in favor of the plaintiff and against the defendant, for Four Thousand Two Hundred and Sixty-two Dollars ($4,262.00) and costs. (Transcript, page 155.) Defendant's motion for a new trial was denied by the Court. (Transcript, page 155.)

Thereafter a petition for writ of error was duly filed by defendant (Transcript, page 218) and an order entered allowing the writ of error and fixing supersedeas bond, and citation was duly entered and writ of error issued. (Transcript, pages 228 and 229.)

The defendant duly filed and served its assignment of errors, and the errors assigned and upon which the defendant relies are found at pages 221 to 224, inclusive, of the transcript, and are as follows:

ASSIGNMENT OF ERRORS.

I.

That the Court erred in refusing to sustain defendant's objection to certain testimony of the plaintiff. The following question was propounded to William Savage, a witness for the plaintiff:

Q. Do you know whether the cogwheels and machinery around the motor were guarded or not, Mr. Savage?

To this question the defendant objected on the ground that it was immaterial. The court overruled defendant's objection, to which ruling defendant excepted and exception was allowed.

II.

The Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

Q. I show you a picure of a machine, and I will ask you to state to the jury whether it is customary for companies for whom you have been employed in the past operating machines that you have seen, to guard cogwheels of that sort?

Mr. McCORD: I object to that as irrelevant, immaterial, incompetent and particularly, your Honor, in view of the law as it exists now. Under the statutes of this State and since the Factory Act is passed, machinery in factories and machinery plants are required to be guarded. This case does not come within that act and counsel is not proceeding upon that theory, and what would be customary in a factory or sawmill or a flour mill has no application to an isolated machine out in the open, which is intended only for temporary purposes. I do not think the question is proper.

THE COURT: If the Factory Act were being invoked here I should consider this question material, but as it is not, I think it is competent for a witness who is acquainted with machinery to testify what is usual and customary in the construction of that kind of machinery.

Mr. McCORD: I object to it on the further ground that it is not a proper hypothetical question, as the witness is not shown to have any knowledge on the subject whatever. He said he had not seen this machine and had not examined it, and did not know anything about it except by passing by.

The objection was overruled and to the ruling of the Court exception was taken and allowed.

Q. Mr. Savage, is it customary for companies to guard cogs of that sort?

A. Well, it has been in all my cases.

Mr McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied.

To this ruling the defendant excepted and exception was allowed.

III.

That the Court erred in overruling the objection of the defendant to certain testimony of the Witness William Savage, a witness on behalf of the plaintiff, as follows:

Q. Mr. Savage, what change might have been made to make it more safe?

A. Well, there is two or three ways they could have changed it, of course.

Q. State to the Court and jury.

A. One, they could have put another platform above that one so that he could have got handily at it, and they could have raised the one that was there a little bit and made it a little longer.

Q. If you are familiar enough with the machine, state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cogwheel any closer than they would be from the machine as you know it, by any change that might be made on that machine?

To which question the defendant objected on the ground that it was irrelevant, incompetent and immaterial. The Court overruled the objection, to which ruling exception was duly taken and allowed.

A. Yes, sir; they could have changed it so as to have got closer to it.

Q. How would that have been done?

A. By putting another platform above the one that was there or raising that one.

IV.

That the Court erred in refusing, at the conclusion of the testimony, defendant's motion for a directed verdict in favor of the defendant. To the ruling of the Court denying defendant's motion for a directed verdict the defendant duly excepted, and exception was allowed.

The following proceedings were taken upon said motion:

Mr. McCORD: I now move the Court to take the case from the jury and to direct the jury to bring in a verdict in favor of the defendant in this action, for the reason that upon the entire testimony the plaintiff has entirely failed to make out a case of negligence against the defendant. I do not care to argue the matter at any length. I simply want to call attention to my view of the matter, that the plaintiff, while he was injured, was working in a place where the danger of the machine was open, obvious and apparent to him. He has shown himself to be a man of ordinary understanding and unimpaired eyesight, and he could see this machine, and he could see its danger and appreciate it, and knew that if he put his hand in contact with it or allowed his clothes to come in contact with the revolving cogs he would be drawn into it and be injured and hurt.

After argument of the motion to the Court, the Court ruled as follows:

THE COURT: I consider that it is expedient for the jury to decide this case. I shall deny the motion.

To this ruling the defendant excepted and exception was allowed.

V.

That the Court erred in denying defendant's motion for a new trial, to which ruling of the Court the defendant excepted and exception was allowed."

The Bill of Exceptions was duly settled and is found on pages 158 to 213 of the Transcript.

ARGUMENT.

Inasmuch as the fourth and fifth assignment of error strike at the very foundation of the plaintiff's case, we will discuss them before taking up the other assignments, and they can both be considered together, as the argument appertaining to one is equally pertinent to the other.

Fourth Assignment of Error:

That the Court erred in refusing, at the conclusion of the testimony, defendant's motion for a directed verdict in favor of the defendant.

Fifth Assignment of Error:

That the Court erred in denying defendant's motion for a new trial.

An examination of the second amended complaint would indicate that it was the intention of the plaintiff to predicate his action upon the common law and under the Factory Act of the State of Washington. However, at the time of the commencement of the second trial, plaintiff elected to proceed exclusively at common law and waived any claim for negligence under the Factory Act. (Transcript, page 168.) Consequently any liability under the provisions of the Factory Act of the State of Washington is eliminated from the case by the election of counsel to proceed at common law only.

Therefore, we will proceed to discuss the law and the facts of this case with reference to the right of plaintiff at common law and with reference to the liability of the defendant in the same manner.

It is our contention, which is abundantly sustained by the evidence and the law, that the plaintiff assumed the risk resulting in his injury on the 12th of July, 1910, while employed by the defendant, and that under the law he is not entitled to recover in this action, and that it was the duty of the court to direct a verdict in favor of the defendant, and failing to do so, it was his duty to grant defendant's motion for a new trial.

The plaintiff was injured by having his arm caught in the cogs of the revolving cog wheels used in operating the elevator in lifting gravel from a gravel pit to a gravel washing machine. The location of the cog wheels, about four feet above a platform four feet wide and six feet long, in the gravel washing machine, has already been specifically set forth in our statement of the case. We do not deem it necessary to make any more definite and specific statement at this time, but will refer to the testimony in our discussion. The injury occurred while the plaintiff was engaged in oiling

bearings upon the shaft that operated the revolving cog wheels. The accident occurred about two o'clock in the afternoon of July 12, 1910, on a clear day, and the light was excellent and the eyesight of plaintiff unimpaired, and he could readily see and observe the revolving cog wheels and all of the machinery connected therewith. It was perfectly light at all times and he testified that he could see perfectly at the time of his injury.

The plaintiff was a man of about twenty-seven or twenty-eight years of age, and according to the allegations of the complaint had been running a motor and cars for some time prior to the date of the injury, and that he had oiled the machinery in question four or five times prior to the date of his injury, and on several different days. He had operated, according to his testimony, an electric motor on the ground near the gravel washing machine for some weeks prior to the accident. He also testified as follows:

Q. How many times were you up there, Melovich?

A. Three or four times before his arm was taken off.

Q. How many days had you been oiling it?

A. When Slim was there; he was there six days he said.

Q. You were up there every day for three or four days, were you?

A. No, he hadn't been up there all the time—just when they sent him up.

Q. On how many different days were you up there?

A. Well every other day he would send me up; that is, he didn't go over there only just when he was sent up there. (Transcript, page 194.)

David Roberts, a witness on behalf of the defendant, testified that shortly after the accident the plaintiff had told him that he had oiled machinery for a period of twenty days about ten times a day. (Transcript, page 211.)

Plaintiff also testified that he took care of and oiled the motor that he had been operating for several weeks prior to the accident, but that that motor was covered.

Again, the plaintiff described in his testimony the location of the platform above which the cog wheels rested, the location of the shafting and the wheels themselves, the belting and the chains operating the elevator, and was able to identify and describe all parts of the gravel cleaning structure by reference to the photographs introduced in evi-

dence by the plaintiff and identified as Exhibit "A." (Transcript, pages 169-170.) He also described the manner in which he oiled the bearings and the shafting and explained that he stood directly in front of the cog wheels as they revolved toward him, and described the oil can, which he said was a foot and a half long, including the spout (Transcript, page 171); that he oiled the machinery while it was still running, and described the size of the platform and space adjoining the machinery within which he could move around in order to oil the same. (Transcript, page 170.) He further testified as follows:

Q. Tell the jury how much space there was between the different pieces of machinery on that platform—how much space there was for you to move about in?

A. There was no room to turn around in; he has to stand in one spot to oil, the platform was so small.

A. About one foot from the belt to the track wheel.

Q. How's that?

A. About one foot, I should judge, from the belt to the track wheel.

Q. Ask him about the top of the platform, I mean, and not the ground?

A. At the top of the platform.

Q. Where the different pieces of machinery were?

A. Yes, where the gravel machine was, between the wheels, about one foot, and about another foot between that wheel and the other wheel, and the other wheel there was a box to be oiled about half a foot from the wheel and he had to reach over there, and that is why his arm was taken off. (Transcript, pages 175-6.)

Again upon his cross-examination he described the machinery and all of the surroundings, giving the width of the platform and the length of it, and the place where the machinery was located above the platform, and the distance from the cog wheels to the platform upon which he was standing, the size and dimensions of the two cogwheels, and he further testified:

Q. Now, you came up here (referring to the platform) on the day you were hurt and oiled the right bearing first, did you?

A. One here and one here (indicating), he said, the shaft, and that is the first point he threw oil on (showing), and he came over here and he put some oil there (showing), and he reached over here to oil this one when it caught his arm and took his arm off.

Q. You had oiled the one on the right hand side, both bearings on both shafts?

A. Yes, sir.

Q. And then did you reach across from here to oil this bearing over there (showing)?

A. There was no way to get past over there and he had to reach into here.

Q. As I understand you, you oiled this bearing and then this one over on that side, and then you came over on that side of the cog wheels, did you?

A. Yes.

Q. Now, where were you standing?

A. Yes, he oiled that one and then he *held back his clothes,* reached over and oiled this one. (Transcript, pages 182-183.)

Q. Do you mean to tell me that you didn't know there was any danger—if you deliberately put your hand in that revolving wheel you thought it would not hurt you, did you?

A. He doesn't know—no, he would not have done anything like that—he would not have.

Q. I want to know whether you didn't know it was dangerous for you to deliberately put your hand in that wheel?

A. No, he doesn't know anything about it?

Q. Didn't you testify in the trial of this case the last time that you knew it was dangerous?

A. He don't remember—he don't know that he said it.

Q. Didn't you state in your former examination, the former hearing of this case, that you would not have put your hand in that wheel for anything, and you would not be fool enough to put the oil can in that revolving cog wheel?

A. Yes, he said he asked him and asked him and asked him, and he said, "I am not crazy enough to stick my hand in there."

Q. You said you were not crazy enough to stick your hand in there—that was what you testified on the former trial?

A. He said that he remembered this way, that he told me to tell the lawyer that anybody that had any sense wouldn't put his hand in there.

Q. That is it exactly, and because you had some sense you would not put your hand in it, either, would you?

A. I would not have gone up and he would not have put his hand in there if he knew it would have took his arm off.

Q. Mr. Melovich, didn't you, on the former trial of this case, in answer to the following question, make the following answer?

"What did you mean a little while ago when you said to the jury that you knew better than to put your hands in there when you were putting the oil on the cog wheels," and didn't you answer that question as follows:

"Any crazy man would know better."

A. He says he didn't have to tell him he was crazy; he says that he had to go up there and oil this machine or oil this box—he knew that he had to do it—he was told to do it.

Q. You heard my question and I want to know, not what he is saying now, but whether or not he testified that way at the last trial. I want you to put it to him so that he will understand it,—whether or not he so testified on the former trial of this case—whether he did or did not. You understand my question, do you?

THE INTERPRETER: Yes.

A. He says that the lawyer asked him a hundred different times, or several different times, why didn't he put his hand in there, and he said he told him he was not a crazy man.

Q. Ask him to answer me yes or no—did he testify that any crazy man would know better than to put his hand in that cog wheel?

A. Well, he is answering it the same way I gave it to you before. I can't get him to say yes or no. I asked him to answer it yes or no. (Transcript, pages 189, 190-1-2.)

The witness, after being instructed by the court to answer the question, declined to do so. Transcript, page 193.)

The testimony of the witness, if the Court will examine it, will disclose that he was a man of ordinary intelligence and that he was feigning ignorance as much as possible to aid him in procuring a verdict at the hands of the jury, but the testimony shows that the plaintiff was shrewd and keen enough to realize the danger that would result to him if he would frankly admit upon the second trial the facts that he testified to upon the first trial, viz: That he knew the revolving cog wheels were dangerous and that if he came in contact with the cog wheels he would be injured. But the Court can reach no other conclusion than that the witness fully understood the danger and realized that if

he permitted his clothes, or his hands, or arms to be caught in the cog wheels he would suffer an injury. This is inadvertently disclosed by him in his testimony where he stated that in reaching over one of the cog wheels to oil the bearings he pulled back his clothes. Why would he do this, if he did not have sufficient intelligence, as his counsel contends, to realize and appreciate the danger that would result to him if his clothing came in contact with the revolving cog wheel? There is no other conclusion to be reached but that the witness's own testimony demonstrated his knowledge of the danger and his appreciation of the injury that might result to him if he became enmeshed in the cog wheels.

Mr. Sears, a witness on behalf of the defendant, testified that he remembered noticing the plaintiff before the accident and of having the superintendent speak of him as an unusually bright man, and that he was advancing both him and his brother and a couple of his cousins. This testimony, taken in connection with the plaintiff's own testimony, must convince the Court that it is begging the question to say that plaintiff was so ignorant that he could not understand and appreciate the danger incident

to oiling the machinery with the revolving cog wheels in motion. Moreover, it does not require a high order of intelligence to operate and understand the dangers incident to machinery in motion.

We have quoted at some length the portions of the testimony of plaintiff to show that he was a man of ordinary intelligence and experience, and to some extent at least familiar with machinery, and that he had been operating an electric motor, acting as brakeman upon railroad trains, and that he had upon a number of occasions oiled the particular machinery in question. There are some acts that all persons of ordinary intelligence are presumed to know and cannot be heard to say that they did not know and apprehend.

In the case of *Maki vs. Union Pacific Coal Company*, 187 Fed. 389, the facts involved were almost identical with those in this case. We quote from the opinion of Judge Sanborn in that case as follows:

"On November 18, 1902, a servant of the defendant, the Union Pacific Coal Company, a corporation, was drawn in between two unfenced cog wheels used by it about its mine at Hanna, in the State of Wyoming, and killed, and Jacob Maki, the administrator of his estate, brought this action to

recover damages caused by his death. At the opening of the trial the plaintiff's counsel made a statement of his case, the material facts of which are these:

In the shaker which was operated in connection with the mine to shake and screen the coal there were two unfenced coacting cog wheels, 'one of which ran horizontally, and right below that was another which ran perpendicularly.' By the side of these wheels and about two and a half feet below the place where they engaged were two planks. The horizontal wheel extended over one plank, so that the decedent had only one plank on which to pass it. He was a Finlander, was employed in and about the machinery, and it was his duty, among other things, to oil the machinery and to pass these cog wheels on this plank about once an hour. On November 18, 1902, the machinery stopped and he was found dead between the wheels. These wheels were not guarded, and had been without fence or guard for a long time."

The Court directed a verdict in favor of the defendant.

In that case it was further contended that the failure to fence off said machinery was negligence in itself, just as it is contended in this case a failure to box in the cog wheels was negligence in itself, and that the servant would not assume the risk of his master's negligence, and therefore the plaintiff was entitled to a verdict, but the Court said:

"The answer is that, while it is true that the servant does not assume the risk of his master's negligence, the effect of which is neither known to him, nor readily observable, nor to be apprehended, yet he does by continuing in the employment without complaint, assume the risk of the effect of such negligence which is known to him or is obvious or plainly observable, and the danger of which is appreciated by him, or is clearly apparent, just as completely as he assumes the ordinary risks of his occupation."

And in support of such statement the court cited the following cases:

Texas & Pac. Ry. Co. vs. Archibald, 170 U. S. 665, 672, 18 Sup. Ct. Rep. 777; 42 L. Ed. 1188;

Choctaw, Oklahoma & Gulf R. R. Co. vs. McDade, 191 U. S. 64, 68, 24 Sup. Ct. Rep. 24, 48 L. Ed. 96;

St. Louis Cordage Co. vs. Miller, 61 C. C. A. 477, 490, 126 Fed. 495, 508, 63 L. R. A. 551;

Burke vs. Union Coal & Coke Co., 84 C. C. A. 626, 628, 157 Fed. 178, 180;

Lake vs. Shenango Furnace Co., 88 C. C. A. 69, 74, 160 Fed. 887, 892;

Kirkpatrick vs. St. Louis & S. F. R. Co., 87 C. C. A. 35, 38, 159 Fed. 855, 858.

"The absence of any fence about the revolving cog wheels and the risk and danger of injury by them were so plainly observable by the decedent, who had been oiling them and passing them on the

plank by their side about once an hour, that he could not have failed to have seen and known them."

And in the Maki case the contention was also made, as it is here, that a recovery may some times be had where the risk is obvious, but the danger is not fully appreciated by the party injured, but the Court in answer to such contention said:

"But the decedent was a man presumably possessing the ordinary faculties of an adult who has a sound mind and body. It is true that he was a Finlander; but the statement of his counsel contained no intimation that he could not see these engaging wheels or could not understand or know that they would crush a human being drawn between them; that a person upon the revolving horizontal weight might be caught between them, and that the clothes of one caught between the engaging cogs would draw him between the wheels; and in the absence of any claim or declaration that he had not the ordinary intelligence, ability and prudence of men in like situations, he must be presumed to have been a Finlander of ordinary prudence and intelligence. And one cannot be heard to say that he did not know or appreciate a danger, whose knowledge and appreciation were so unavoidable that a person of his prudence and intelligence could not have failed to perceive and appreciate it."

And in support of the foregoing statements, the Court cited the following cases:

"*Lake vs. Shenango Furnace Co.*, 88 C. C. A. 69, 74, 160 Fed. 887, 892;

St. Louis Cordage Co. vs. Miller, 61 C. C. A. 477, 495, 126 Fed. 495, 513;

Kirkpatrick vs. St. Louis & S. F. R. Co., 87 C. C. A. 35, 39, 159 Fed. 855, 859;

King vs. Morgan, 109 Fed. 446, 448, 48 C. C. A. 507, 509;

Moon-Anchor Consol. Mines vs. Hopkins, 111 Fed. 298, 305, 49 C. C. A. 347, 353.

In the case of *Butler vs. Frazee,* 211 U. S. 459, 29 Sup. Ct. Rep. 136, the operator of a mangle in a laundry had her fingers drawn within the revolving cylinder, and it appeared that a finger guard in front of the cylinder was out of adjustment and that the fingers of the operator were caught and crushed in the cylinder, and in discussing the subject the Court say:

"One who understands and appreciates the permanent conditions of machinery, premises and the like, and the danger which arises therefrom, or, by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of facts the law declares that he assumes the risk. The rule is too well settled to warrant an extensive discussion of it or an attempt to analyze the different reasons upon which it has been held to be justified. The rule of assumption

of risk has been thought by many a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it, which from time to time have been made, as, for instance, by Congress in the safety appliance law. But the common law in this regard has not been modified in the District of Columbia and we have no other duty than to enforce it. * * *

But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both conditions and the dangers are obvious to common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the Court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Citing *Patton vs. Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275.

"The danger of being drawn between the cylinder and the rollers by contact with the cylinder was illustrated to her every minute of the day by the drawing of the clothes to be ironed by contact with the revolving cylinder. The distance between the

guard rail and the feed board was constant and its relation to the thickness of her hand was apparent. She must have understood that if her hand became inextricably entangled with the clothes, as seems from the rather vague testimony of the plaintiff was the case here, it would be drawn between the cylinder and receive the injury which unhappily occurred. We think that it must be said as a matter of law, that she voluntarily assumed the risk of the danger."

Butler vs. Frazee, 211 U. S. 459, 29 Sup. Ct. Rep. 136.

In view of the law as laid down by the Supreme Court of the United States in the foregoing case, we do not see how it is possible for this Court to reach any other conclusion than that the plaintiff in this case must have known that his arm would be injured if he allowed it to come in contact with the revolving cog wheels, and particularly in view of the fact that he says that he pulled his clothing back so as not to be caught in the machinery; and he later in his testimony, (page 188 of the Transcript), says he did not have to keep his clothing off the cog wheels, as his "jumper was tight fitting."

The plaintiff cannot be heard to say, in view of his admissions as to knowledge and appreciation of danger, that he did not know the danger. His entire testimony must be taken together and a common sense interpretation given to it.

When a servant was between 19 and 20 years old and sound in body and mind at the time he was injured, and possessed of the knowledge and experience of an adult, he was chargeable with the consequences of such knowledge, and the fact that he was under twenty-one years of age was not material in determining whether he assumed the risk of the dangers he involuntarily encountered in the operation of defendant's machinery.

Federal Lead Co., vs. Swyers, 161 Fed. 687.

In the case of *Puget Sound Electric Ry. vs. Van Pelt,* 168 Fed. 206, this court approved the following instruction:

"He is chargeable with the assumption of the risks that were necessarily incident to the employment, and with the assumption of risk which he knew about, of which he had knowledge—actual knowledge—and also with the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake. If the fuse was placed in a situation where it would injure him by its explosion, and there was negligence on the part of defendant in placing it there, the question then to be decided is whether the plaintiff himself knew that it was liable to explode and flash in his eye and do him injury. If he had that knowledge, it should be considered that he assumed all risk, and he is not entitled to compensation by reason of the injury which he suffered."

In this case the danger was different from that in the case of the fuse. Here it must be conceded that the danger from the revolving cog wheels was obvious and open, and not latent, and one which any man even of the lowest order of intelligence would appreciate, particularly in view of the statement that he held back his clothes so as not to come in contact with the cogs, and that a crazy man would not put his hand in contact with the revolving wheels, so that this rule of law for which we are contending is not only unheld by the decisions of the Circuit Court of Appeals of other circuits, but by the Supreme Court of the United States and by this State.

"There are some things must be charged to the common knowledge of all men. That a pile of wood four feet wide and eighteen feet high is obviously dangerous and that it might fall at any time is apparent to any one in possession of his faculties."

Deaton vs. Abrams, 60 Wash. 4.

In *Goddard vs. Interstate Telephone Co.,* 56 Wash. 536, everything "was out in the open," there was no hidden defect and no knowledge was withheld.

In *Soderburg vs. Wells,* 57 Wash. 281, it was said: The following rule of the courts of other states were adopted by this Court:

"In discussing the safe place doctrine, in *Borden vs. Daisy Roller Mill Company,* 98 Wis. 407, the Court said:

'In the discussion and decision of this case the rule has been kept clearly in mind that a servant is not obliged to search for defects in instrumentalities furnished for his use, but may rely on the duty of the master to see that they are reasonably safe; yet such rule does not militate at all against that other rule, just as well settled in the law of negligence, that the master may rely on the duty of the servant to observe all defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work.'

In *Illinois Central R. R. Co. vs. Sanders,* 58 Ill. App. 177, the Court said:

'A man cannot decline to see and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate.'

In *Evansville & T. H. R. Co. vs. Duel,* 134 Ind. 156, the Court said:

'While the employees may repose confidence in the prudent and cautious adherence to duty by the employer, yet he may not repose that blind confidence in the performance of the employer's duty

which fails to observe the patent defects which an ordinary observation of the employee's duty would readily disclose.'

In *Chesson vs. Roper Lumber Company,* 118 N. C. 59, the Court said:

'The servant is culpable if he fail to discover such a defect as would have been apparent, without a thorough examination, if he had used ordinary diligence to discover it.' "

"The consensus of these decisions is, that where the danger is alike open and obvious to the servant as well as the master, both are upon an equality, and the master is not liable for an injury resulting from a danger incident to the employment."

Deaton vs. Abrams, 60 Wash. 6.

In the case of *Shore vs. Spokane & Inland Empire Railroad Company,* 57 Wash. 212, the Court said:

"He knew that if he came in contact with the two wires while the wire he was strinigng was grounded the result would be disastrous if not fatal to him. His injuries resulted from dangers incident to his employment, which he clearly assumed. It would be idle to cite decisions from this and other courts to that effect, but the rule is clearly stated in the following cases:

Week vs. Fremont Mill Co., 3 Wsah. 629, 29 Pac. 215;

Schulz vs. Johnson, 7 Wash. 403, 35 Pac. 130;

Olson vs. McMurray Cedar Lumber Co., 9 Wash. 500, 37 Pac. 679;

Bullivant vs. Spokane, 14 Wash. 577, 45 Pac. 42;

Hoffman vs. American Foundry Co., 18 Wash. 287, 51 Pac. 385;

Anderson vs. Inland Tel., etc., Co., 19 Wash. 575, 53 Pac. 657;

Brown vs. Tabor Mill Co., 22 Wash. 317, 60 Pac. 1126;

Danuser vs. Seller & Co., 24 Wash. 565, 64 Pac. 783;

Grout vs. Tacoma Eastern R. Co., 33 Wash. 524, 74 Pac. 665;

Bier vs. Hosford, 35 Wash. 544, 77 Pac. 867;

Ford vs. Heffernan Engine Works, 48 Wash. 315, 93 Pac. 417;

Brown vs. Oregon Lumber Co., 24 Ore. 315, 33 Pac. 557.

"Respondent had been employed around the mill as a common hand for about three months, but the accident which caused the injury happened on the third day of his employment within the mill. The cog which crushed the finger of respondent was uncovered. His theory is that this was negligence on the part of appellant, and that in any event respondent should have been instructed as to his duties around the machinery and the danger of the same. Respondent in picking up small pieces of lumber which had fallen over the skid and in front of the cog which was in the live roller, did not notice the cog, and his hand was

thereby brought in contact with it and the injury induced. He claims he did not know that the cog was there, or could not see it by reason of its being covered by this refuse lumber."

The dangers in this instance were apparent and the law is well settled that the employee, when he assumd the employment, took the risk of all apparent danger.

"Three days' observation of this machinery around which this man was working would naturally make him acquainted with the location of all of the cogs; and if he did not exercise discretion or thought or care enough and pay sufficient attention to their location to know where they were, he cannot complain if by reason of such heedlessness he is damaged."

Olson vs. McMurray Cedar Lumber Co., 9 Wash. 500.

We do not feel that it is necessary to multiply citations announcing the doctrine set forth in the preceding cases which we have cited. The rule is well settled that where the dangers are open, obvious and apparent, as in the case of exposed cog wheels, such dangers are incident to the business and to the employment, and are assumed by the servant, and that the master is not liable for injuries sustained through such assumed risk. And

it was the duty of the lower court to have ordered a directed verdict in favor of defendant. Inasmuch, however, as he did not do so, then it was clearly his duty to grant defendant's motion for a new trial. Consequently this Court should direct that the directed verdict should be entered and the action dismissed; or in any event, the action should be reversed and a new trial granted.

We will now take up and discuss the other errors assigned.

Second Assignment of Error:

The Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

"Q. I show you a picture of a machine and I will ask you to state to the jury whether it is customary for companies for whom you have been employed in the past operating machines that you have seen, to guard cog wheels of that sort?

Mr. McCORD: I object to that as irrelevant, immaterial, incompetent, and particularly, your Honor, in view of the law as it exists now. Under the statutes of this State and since the Factory Act is passed, machinery in factories and machinery plants are required to be guarded. This case does not come within that act and counsel is not proceeding upon that theory, and what would be

customary in a factory or sawmill or a flour mill has no application to an isolated machine out in the open, which is intended only for temporary purposes. I do not think the question is proper.

THE COURT: If the Factory Act were being invoked here, I should consider this question material, but as it is not, I think it is competent for a witness who is acquainted with machinery to testify what is usual and customary in the construction of that kind of machinery.

Mr. McCORD: I object to it on the further ground that it is not a proper hypothetical question, as the witness is not shown to have any knowledge on the subject whatever. He said he had not seen this machine and had not examined it, and did not know anything about it except by passing it.

The objection was overruled, and to the ruling of the Court exception was taken and allowed.

Q. Mr. Savage, is it customary for companies to guard cogs of that sort?

A. Well, it has been in all my cases.

Mr. McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied.

To this ruling the defendant excepted and exception was allowed."

The Court erred in permitting Mr. Savage to testify as he did. In the first place, he was not shown to have any qualifications or any knowledge

or experience in the business sufficient to enable him to form an opinion; and, in the second place, the answer was not responsive to the question. The answer might have been true, but yet would have no tendency to establish any particular custom in regard to guarding cog wheels; and, in the third place, the question and answer were wholly immaterial, if this action had been prosecuted under the Factory Act of the State of Washington, but in view of the waiver of the right to proceed under that act by counsel for the plaintiff at the commencement of the trial, it became wholly immaterial as to what the custom was. The witness further testified that he had no knowledge of the conditions around this machine and knew nothing about the operation of a gravel machine, such as this one was; and yet the admission of this testimony by a party not qualified was certainly prejudicial to the defendant, and the Court erred in permitting the witness to testify and in refusing to strike the testimony from the record.

Third Assignment of Error:

That the Court erred in overruling the objection of the defendant to certain testimony of the wit-

ness William Savage, a witness on behalf of the plaintiff, as follows:

"Q. Mr. Savage, what change might have been made to make it more safe?

A. Well, there is two or three ways they could have changed it, of course.

A. State to the Court and jury.

A. One, they could have put another platform above that one so as he could have got handily at it, and they could have raised the one that was there a little bit and made it a little longer.

Q. If you are familiar enough with the machine state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cog wheels any closer than they would be from the machine as you know it, by any change that might be made in that machine?

To which question the defendant objected on the ground that it was irrelevant, incompetent and immaterial. The Court overruled the objection, to which ruling exception was duly taken and allowed.

A. Yes, sir; they could have changed it so as to have got closer to it.

Q. How would that have been done?

A. By putting another platform above the one that was there, or raising that one."

The witness Savage testified over the objection of defendant that changes could have been made that would have rendered the operation of the cog

wheels safer than the means employed by the de-defendant. There is probably no accident that ever occurs that might not have been prevented by the adoption of some other means or appliances. After an accident, it is always easy for a suggestion to be made of some improvement that would have prevented the accident. But we contend that this is not the test of liability for injury, and that any evidence tending to show changes or repairs to prevent recurrence of the injury is inadmissible, and the Supreme Court of Washington has repeatedly so held. In an action to recover for injury received on account of negligence of the master to provide improved machinery and appliances, evidence is incompetent for the purpose of showing that changes have been made in such machinery after injury to an employee.

Bell vs. Washington Cedar Lumber Co., 8 Wash. 27.

"Evidence that after an accident defendant remedied the defect is not admissible for the purpose of showing negligence."

Carter vs. Seattle, 21 Wash. 585.

This Court has held and the Supreme Court of

Washington has held that since the passage of the Factory Act, evidence that repairs have been made after the injury is inadmissible to show that the machinery could have been practically guarded, but for no other purpose.

On an issue as to whether a saw could have been advantageously guarded under the Factory Act, it is not error to admit evidence that after the accident it was guarded, where the evidence was offered for the purpose of showing that the same could have been guarded, and the jury were instructed to consider it only for that purpose.

Erickson vs. McNeeley, 41 Wash. 509;

Thompson vs. Issaquah Shingle Co., 43 Wash. 253.

For the foregoing reasons we are confident that the lower court committed errors to the material detriment of the defendant, and that this action should be reversed and ordered dismissed, or in the alternative a new trial should be granted.

Respectfully submitted,

KERR & McCORD,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation,

Plaintiff in Error,

vs.

ELI MELOVICH,

Defendant in Error.

No. 2160

Brief of Defendant in Error

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Brief of Defendant in Error

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Brief of Defendant in Error

ARGUMENT

Plaintiff in error has, after two trials lasting two days each, and after the first jury's verdict for $12,262, the full amount of plaintiff's claim, after the second verdict of $4,262, and after two long years of trying litigation, with as many attempts made to defeat the plaintiff as were ever made in any law suit, has for the first time practically admitted the weakness of its cause by the character of brief submitted and citations made.

As suggested by the appellants, the parties hereto will be referred to as plaintiff and defendant as in the lower court. Before entering upon a discussion of the points involved, it is desired to point out a few of the discrepancies in the brief of the defendant. On page 4 thereof, reference is made to the electric motor that furnished the power for the operation of the cog wheels that crushed the arm of the plaintiff, and the attention of the court is now called to the fact that it was no part of that motor which inflicted the injury. We should not confound the cogs in which plaintiff lost his arm with the converted street car mechanism which was operated by the plaintiff and referred to as a "motor," but which had no dangerous parts exposed and which was operated by a lever or handle as is a street car motor, and which, instead of being "similar," as asserted (brief p. 4), was "altogether different" from the other motor (Trans. p. 196), and in working on the motor below he could not see cogs above, as they were high in the air and some distance away.

The platform "immediately beneath the cog wheels" (Trans. p. 4) is shown to be about four feet below the bearings that the plaintiff went up to oil (Brief, p. 5), indicating that the place in

which the oil was to be put was about on a level with the breast of a man, and the oil can used was about one foot long in all and the spout on the end was straight (Tr. p. 189), and not "a can with a hooked stem from twelve to eighteen inches in length," as asserted (Brief p. 5). By reference to page 28 of the brief, it will be found stated that plaintiff testified that he had acted "as brakeman upon railroad train." Nowhere in the testimony will it be found that the plaintiff or any one else testified that plaintiff had ever acted as brakeman upon a railroad train, and the fact is that in the trial before the first jury he testified that he had done laboring work in a railroad gang and had been working for three months for defendant but had only on two occasions for a moment been up to oil the cogs in question and that that was not his work.

As stated (Brief p. 6), "through some inadvertence or for some reason," one hundred five pages of the transcript consists of matters involved in the first trial; we believe, however, that it will be helpful and material to an understanding of this case as the case was tried the first time. The defendant calls special attention to the fact that the "inadvertence" which resulted in bringing the first trial prominently before this court is not properly chargeable

to him, but nevertheless counsel ordered said transcript of their own free will and accord without even a suggestion from counsel for defendant in error. The inclusion of the record of the first trial in the printed record is commendable, and the defendant in error waives any right he may have to object to it. It is therefore, respectfully commended to the consideration of this court, as being historical if not most material, especially the portion which refers to the granting of the new trial and the setting aside of the first jury's verdict for $12,262 owing to the alleged improper use of the word *"ANY."*

Fourth and Fifth Assignments of Error.

The defendant discusses the fourth and fifth assignments of error first, and the plaintiff will, in his brief, take up the various assignments of error in the same order.

The first contention of the defendant is that the plaintiff assumed the risk of injury, and in support of this contention it calls attention to the age of the plaintiff, and that he had oiled the machinery in question four or five times prior to the day when he was injured. The testimony of defendant's witness David Roberts, is garbled and improperly stated (Brief p. 21; Transcript p. 211).

Stenographer's transcript, page 141, is as follows:

"Q. Mr. Roberts, on the occasion of the former trial were you asked this question, or rather did you give this answer (reading): 'A. We were talking with Melovich, and Melovich had been up there quite a while working at different occupations, but we asked him how long he had been on this particular work that he was hurt on, and he said that he had been there about twenty days, and they asked him how long or how often during each day he had oiled the gearing, and he said—*somebody said* "Five" and he said "Yes," and *somebody* said "Ten" and he said "Yes." He was talking very brokenly, and my best impression of it is that, while no definite time was arrived at, that it was several times that he went up and oiled that gear each day'?

A. Yes.

Q. Did you make that statement?

A. Yes."

It is evident that the statement of the testimony of Mr. Roberts as given on page 211 of the Transcript would not give this court an unbiased idea of the true facts as testified by Mr. Roberts.

As supposedly indicating that the plaintiff knew of, understood and appreciated the danger, the defendant says (Brief p. 21) that the plaintiff testified that he had taken care of and oiled the motor that he had been operating for several weeks before the accident, but that that motor was covered, but no mention is made in the brief of the fact that plaintiff

never oiled that motor when it was running, but always at noon when he went to work, and then merely put the oil in the box where it had to be oiled, and the only place where it could be oiled because of the fact that the cog wheels were covered (Trans. p. 195), and the motor was altogether different (Trans. p. 196). It is also stated by the defendant (Brief p. 21) as indicating knowledge of the danger on the part of the plaintiff that the plaintiff described the location of the platform above which the cog wheels rested and other parts of the machine, in such a way as to evince a knowledge of them such as would cause him to know and appreciate the danger. It will be remembered that the plaintiff testified in this case after having been through the first trial of the case (See Trans. pp. 37 to 142), and that he had visited the gravel machine several times with his attorney, in getting the various pictures and had after the accident had the details impressed on him (Stenog. Trans. of Evidence p. 15), and that he was present when the photographs of the machine were taken (Stenog. Trans. of Evidence p. 11). He saw the cog wheels of the machine after it had taken his arm off about the same number of times that he had seen them before the accident, and it would be but reasonable

to concede that he would have a more acute interest in the details of the machine and give it closer scrutiny and understand and appreciate the danger better after it had ground his arm off than he would have had before the injury to him. It is but an exemplification of the old adage of the burned child and the fire.

After quoting from the testimony of the plaintiff concerning a certain statement made by him on the first trial of the case, wherein, "after the lawyer had asked him a hundred different times," he said, "any crazy man would know better" than to put his hands in the wheels when putting oil on the cog wheels, the defendant refers to plaintiff as "shrewd and keen enough to realize the danger that would result to him if he would frankly admit upon the second trial the facts that he testified to upon the first trial, viz.: That he knew the revolving cog wheels were dangerous and that if he came in contact with the cog wheels he would be injured." On the trial, the plaintiff testified (Trans. p. 171):

"Q. When the wheel was going around, could you see the cogs?

A. It goes fast like the wind is blowing and you could not see it."

From this it is evident that he did not appreci-

ate the danger from the cogs, since he could not see them. Even if he could have seen them still he would not be charged with the knowledge the defendant would have this court believe he possessed, upon such evidence.

The court will readily distinguish the difference between putting one's hand in among cog wheels, and reaching over such cogs to put oil on a bearing of the machine of which the cogs were a part. Plaintiff was oiling the bearings and not thrusting his hands into the cogs, as defendant would have us believe. The place was not, as plaintiff in error would have us believe, *light,* but being boarded up, was very dark (Brief p. 20; S. of F. p. 40).

The knowledge of a possible injury one may suffer if he deliberately places his hand in exposed cogs or wheels, as distinguished from his knowledge of the danger to him from a situation in which he is placed by reason of the negligence of another in not furnishing safe surroundings and suitable instrumentalities in and with which to work, is distinguished in a case in the Circuit Court of Appeals, Second Circuit, decided January 9, 1911, in which case the parties and the facts were practically no different from those in the present case.

In that case the defendant alleged that the plaintiff, who was a Russian Pole, speaking and understanding the English language imperfectly, a common laborer, while working for the defendant had his right arm caught in a machine and so crushed and mangled that amputation became necessary, was negligent in that he endeavored to put certain material into a machine while it was in motion; the injury occurring four and one-half days after he had first commenced to work with the machine. The defendant's theory there was, as is contended in this present case, that the plaintiff instinctively knew of the danger. In the opinion in the case, *American Manufacturing Company vs. Zulkowski,* C. C. A. 146, the court, through Coxe, Circuit Judge, said:

"In deciding that the defendant's theory was not a fair version of the accident, the jury were justified in considering the ordinary instincts of self-preservation which govern human conduct. *Even the most ignorant laborer would have known that if he placed his hand in such a position it would surely be caught and injured. No expert knowledge was required to enable him to appreciate this self-evident fact. * * * The jury were justified in considering the improbability that he would do an act which would impeach his sanity.*"

Thus, it is held that while a person's instinct may create within him a certain fear due to his surroundings yet not induce such knowledge as would

bring him to *understand and appreciate* the danger, so as to charge him with assuming a risk in having encountered it.

These cases just cited go to establish the rule that where a servant either does not know, or, knowing, *does not appreciate such risks;* and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries; and the natural corollary that if the employer knows, or ought to know, that the dangers of the employment are unknown to or not appreciated by the servant, the servant should be instructed so that he may reasonably understand the perils. That such is the rule of law is well supported by decisions of the highest courts.

Choctaw, etc., R. Co. vs. McDade, 191 U. S. 64 (48 L. Ed. 96).

Railroad Co. vs. O'Brien, 161 U. S. 451 (40 L. Ed. 766).

Voelker vs. Railroad Co., 116 Fed. 867.

Railroad Co. vs. Holloway, 52 C. C. A. 260 (114 Fed. 458).

Pierce vs. Calvin, 27 C. C. A. 227 (82 Fed. 550).

Davison vs. Railroad Co., 44 Fed. 475.

Bean vs. Navigation Co., 24 Fed. 124.

Thompson vs. Railroad Co., 18 Fed. 239.

Railroad Co. vs. Linstedt, 106 C. C. A. 238.

Mather vs. Rillston, 156 U. S. 391 (39 L. Ed. 464).

Lathi vs. Rothschild, 60 Wn. 438.

The mere fact that the employe *knows* there is danger will not defeat his right to recover if in obeying the order of his employer he acted with ordinary care under the circumstances.

Allen vs. Gilman, McNeil & Co., 127 Fed. 609.

R. R. vs. Linstedt, 106 C. C. A. 238.

In the case of the *Atlantic Coast Line Railroad Co. vs. Linstedt,* 106 C. C. A. 238, decided late in the year 1910, it is said:

"The defendant cannot, as a matter of law, defeat the right of the plaintiff to recover merely because the danger of riding on a brake beam was apparent, if the safety and suitableness of the same as an appliance was in issue, and the inexperience, lack of knowledge and failure of warning to the plaintiff was also present.

"In such case, involving a neglect by the master of the primary duties imposed upon him, *it must be made to affirmatively appear that the servant not only apprehended the danger thus arising from the master's neglect, but that the particular peril or hazard was appreciated by him.*

"Authorities to support these views might be given almost without number. *Butler vs. Frazee,* 211 U. S. 459, 466, 469, 29 Sup. Ct. 136, 53 L. Ed. 281, an opinion by Mr. Justice Moody, will be found to

contain a particularly interesting discussion of the subject, with citation of authorities."

In the case of *Butler vs. Frazee,* 211 U. S. 459, 53 L. Ed. 281, is said:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employe must be held, as a matter of law, to *understand, appreciate and assume* the risk of it."

Railroad Co. vs. Swearington, 196 U. S. 51 (49 L. Ed. 382).

Fitzgerald vs. Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537.

R. R. vs. Jarvi, 53 Fed. 651 (3 C. C. A. 433).

In *Railroad vs. Swearingen,* 196 U. S. 51 (49 L. Ed. 382), the following language was employed:

"As we have already decided that knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 *could not be imputed to the plaintiff simply because he was aware of the existence and general location* of the scale box, *it was for the jury* to determine, from a consideration of all the facts and circumstances in evidence, whether plaintiff had actual *knowledge* of the danger."

Indeed, it has been said that a servant who does not *appreciate* the dangers to which he is subjected is not to be held to have assumed the risks of the employment only, but that he *cannot consent* to assume them. In *Felton vs. Girardy,* 104 Fed. 127,

the opinion by Lurton, Circuit Judge, says:

"If the employment be of a dangerous character requiring skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that from his youthfulness, feebleness, *incapacity or inexperience, does not appreciate them, the servant cannot, even with his own consent, be exposed to* such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and with proper care on his part, do his work safely."

The same court, by the voice of the same judge, said in *Railroad Company vs. Miller,* 104 Fed. 124:

"It is illogical to say that a servant impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant; unless the dangers are so obvious that even an *inexperienced man could not fail to escape them by* the exercise of ordinary care.

"The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from want of the degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation with safety to the operator, as when the disqualification is due to youthfulness, feebleness, or general incapacity.

"If the master has notice of the dangers liable to be encountered, *and notice that the servant is inexperienced,* or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duty."

In the case of *Clow & Sons vs. Holtz,* 34 C. C. A. 550, the court left the question to the jury to say whether the car by which the plaintiff was injured, as constructed, with certain wedges which had been added and of which he knew, was a machine which a reasonably prudent employer would furnish to his servants to be used in his business, and charged the jury that if the dangerous character of the machine *was so obvious that an ordinarily intelligent laborer of the class of laborers to which the plaintiff belonged must or should have observed its danger,* and the plaintiff nevertheless continued in the employ of the master without complaint, he assumed the risk incident to such employment, and was guilty of contributory negligence, should injury occur.

The Circuit Court of Appeals, in an opinion by Taft, Circuit Judge, said:

"The only point upon which we feel the slightest doubt in this case arises upon the motion which was made by the defendant, at the close of the plaintiff's evidence, to take the case away from the jury and direct a verdict for the defendant, on the ground that the plaintiff *must have known* the dangers incident to the use of the machine from the use of which the injury happened, *and must therefore have assumed the risk.*

Now that the accident has happened, now that the measurements are given, now that the weight of the cores are accurately known * * * it may be

difficult to understand how anyone with the slightest knowledge of mechanics could fail to appreciate the dangers arising from the use of this car with the cores adjusted as they were. But it must be borne in mind that the plaintiff was a *common laborer;* that the safety of the machine had been brought to the attention of the superintendent and managers of the foundry; that the car had been operated for six months without injury, and that the plaintiff had a right to assume that his master would exercise due care in his behalf in keeping the machinery and appliance safe.

In the light of these considerations, *we cannot say that the question of the plaintiff's negligence, or the question of the amount of risk which he assumed, was not a* question for the jury.

It was left to them with the proper and discriminating statements of the law, and application of the law to the facts.

The jury found that the circumstances were such that he was not charged with the knowledge of the danger incident to the use of that machine.

We do not think the course of the court, in leaving this issue open to be settled by the jury, was erroneous."

In *Deninger vs. American Locomotive Co.*, 107 C. C. A. 127, decided February 6, 1911, Gray, Circuit Judge, said:

"The defendant, however, relies strongly upon the proposition that the risks of the situation were all *known to* and appreciated by the deceased, and therefore assumed by him as risks of his employment. Certainly this is true of the ordinary risks inherent in the employment, but it is not true of the risks or dangers arising from the default of the defendant.

Whatever the risks assumed by a servant in entering upon his employment may be, the one risk he does not assume, is that arising from the negligence of his employer. * * *

The law deals with men in their various relations in life, as endowed with average intelligence and capacity, and recognizes their limitations, and that under certain circumstances, inadvertence and distraction may be excusable, where under other circumstances they would constitute a serious default. *If, then, the absence of the automatic safety device, which in efficient operation would have prevented the accident, was due to a want of reasonable care on the part of the master, the risk arising from its absence was not one of the risks assumed by the deceased in entering upon his employment.* Though this risk, arising from the negligence of the master, was not thus assumed, yet it is true that, if the deceased was *aware of and appreciated the danger* therefrom he might, by his own negligence in exposing himself thereto, have contributed to his injury, and thus debarred himself from recovery. But there is no affirmative proof of such negligence on the part of the plaintiff, and no fact referred to from which such negligence can be properly inferred as a matter of law. The facts and testimony bearing upon the question were, however, submitted to the jury with proper instructions by the court below.

In considering, on the evidence, the question as to how far primary duty of the master was performed, in providing the safe place in which to work and the safe applicance with which to work, it must be remembered that there was no compulsion on the defendant to use this dangerous hand lever in the operation of its machine. There was testimony before the jury, to be given such weight as they determined justly attached to it, that these levers were first used in these new and large machines; that

this very head had been frequently operated with a wheel of moderate size, and that it had been so operated ever since the accident. Obviously, the use of the wheel for the purpose that the lever was used for would have avoided all the dangers attending upon the latter. The mere fact that it required more power to move a wheel of moderate diameter would not necessarily excuse the defendant from adopting it, in view of the tragic experience in its own shops with the hand lever. No mere economy, pecuniary or otherwise, can excuse a master from the performance of the primary duty imposed upon him to make a reasonable safe place in which his servant is to work.

This case was submitted to the jury by the learned judge of the court below, and with this evidence all before it, it found a verdict in favor of the plaintiff. A motion for peremptory instructions for the defendant was denied by the court, and after verdict, motion for a new trial and for judgment, *non obstante veredicto*, was made by the defendant, which latter motion was granted by the court, and judgment entered accordingly. *We think this case should not have been disposed of, and there was evidence sufficient to go to the jury and to warrant the verdict rendered.*"

It is contended by the defendant that the rule of the law in the State of Washington differs from the rule as laid down in the cases cited. The opinion in the case of *Lahti vs. Rothchild*, 60 Washington 438, rendered in November, 1910, says:

"Learned counsel for appellant contend that the use of the large link chain for handling this lumber, and the evidence tending to show that it was not suitable for that purpose, was a sufficient showing of

negligence on the part of respondents to call for the submission of that question to the jury. This contention we think is well founded, unless it can be held, as a matter of law, that appellant assumed the risk incident to the use of the chain because of his knowledge of such use and the danger thereof. It seems to us that a jury might well be justified in believing from this evidence that the risk incident to the use of this large link chain was extraordinary. That is, *that it was a risk which could have been obviated* by the exercise of reasonable care on the part of respondents. 1 *Labatt, Master and Servant,,* Sec. 270. Hence, its use might justify a finding of negligence against respondents, though it may be conceded that it would not be such negligence but that liability therefor could be obviated by appellant's assuming the risk. Now, can it be said, as a matter of law, upon this record, that appellant assumed this risk, supposing that the jury might conclude that the risk was extraordinary. This question must be answered in the light of the evidence touching appellant's knowledge of the use of the chain, *and also his knowledge of the danger incident to its use.* Of course, he knew of the use of the chain, but before he can be charged with assumption of the risk, it must appear that he *comprehended the danger* as well as knew of the physical conditions. *Bailey, Master's Liability for Injuries to Servants,* 184; *Wood, Law of Master and Servant* (2nd Ed.), Sec. 376; *Shoemaker vs. Bryant Lum. & Shingle Mfg. Co.,* 27 Wash. 637, 68 Pac. 380.."

In 1 *Labatt on Master and Servant,* Sec. 271, the rule is stated as follows:

"An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and *comprehended* by the servant, or—as the same conception may also be expressed in logically equivalent

terms—where the servant is chargeable neither with an actual nor a constructive knowledge and *comprehension of the risk.*"

Learned counsel for respondents contend, in substance, that the evidence of appellant's experience as a longshoreman is sufficient to impute to him a *comprehension of the dangers* of using this large link chain, and that the trial court was justified in so determining as a matter of law. It is true that appellant appears to be a longshoreman of considerable experience. He tells us in his testimony, however, that he never had experience in the use of a chain of this size in handling pieces of these dimensions, and did not know that such chain could not securely hold a sling load of such pieces. We have seen that he worked there five or six days under these conditions without anything occurring that would suggest such danger to him. *If he comprehended*, or was bound to comprehend, such danger, it was only because of his general knowledge of, and experience in, the business. It seems to us the danger was not so apparent that it can be decided, as a matter of law, that a reasonable person in his position and *with his knowledge and experience* was bound to *know and comprehend* the risk incident to the use of this chain. *We think reasonable minds might differ upon this question, and that it was*

therefore a question for the jury. We conclude that the learned trial court erred in taking the case from the jury at the close of appellant's evidence.

What are the facts in this case at bar with respect to the capacity, knowledge and experience of the plaintiff, as shown by the evidence in the case, and upon which should be based the decision as to whether or not the danger incurred by him in working about the cogs which caused his injury was necessarily obvious to him?

The plaintiff is an *uneducated* man, who does not *speak nor understand* the English language. He testified that he was employed in the capacity of a common laborer, that he had no knowledge of machinery, had never worked about it, never saw a set of cogwheels prior to beginning work for the defendant company, and was not instructed as to the manner of doing the work nor of the danger which he would encounter in doing it. Upon cross-examination he reasserted that he had never worked with machinery other than the pick and shovel, nor about it, nor in mines, and was totally ignorant of it. *His testimony is absolutely undisputed.* It is evident, therefore, that, as a matter of law, he was disqualified to do the work assigned to him in the oiling of the cogs which caused his injury, because of his

want of capacity, lack of knowledge and inexperience, and consequent failure to *appreciate and actually know the danger incident to such work.*

The Circuit Court of Appeals, Ninth Circuit, in an opinion by Gilbert, Circuit Judge, in *Puget Sound El. Ry. v. Van Pelt*, 93 C. C. A. 492, said:

"To make a complete and valid defense on that ground, it should be proved by a fair preponderance of the evidence that the plaintiff himself was informed as to the risk there was; the nature of the danger in which he was placed for work, with that fuse located as it was. The law does not under any circumstances exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond that he has the right to assume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances. * * * He is chargeable with the assumption of risks that are necessarily incident to the employment, and with the assumption of risks which he knew about, *of which he had knowledge—actual knowledge*—and also the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake."

Could it be possible to conceive of a more thoroughly irresponsible person in the situation in which this plaintiff was placed when he was ordered to oil the cogs, gears, etc., which caused his injury, or one having less experience or capacity and less capable of *understanding and appreciating* the dangers inci-

dent to the work to be done; or one more completely within the exceptions announced in the cases which have been cited above? Can it be said, either as a matter of law or as a matter of fact, that the plaintiff in this case, upon the evidence in the case, *appreciated* the danger he encountered? If he did not, then, as a matter of law, he did not assume the risk.

The court did not err in denying defendant's motion for non-suit, at the close of plaintiff's case, since there was testimony which, if not contradicted, would sustain the main allegations of the complaint, and that it was not overcome by the testimony of witnesses for defendant is established by the verdict of the jury.

In *Kreigh vs. Westinghouse,* 214 U. S. 249 (53, 984), it is said:

"Questions of negligence do not become questions of law to be decided by the court, except where the facts are such that all reasonable men *must* draw the same conclusion from them; or in other words, a case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Gardner vs. R. R., 150 U. S. 349 (37-1107).

The trial judge, after listening to the testimony on the first trial of the case, and again on the second trial, recognized the fact that all reasonable men could not draw from the evidence the conclusion that the plaintiff was not entitled to recover for the injuries he sustained, and, accordingly, when the motion for a directed verdict was made said:

THE COURT: "I consider that it is expedient for the jury to decide this case. I shall deny the motion." (Trans. p. 224.)

That all reasonable men would not draw the same conclusion from the evidence is further established by the action of the jury, in which twelve men of the average of the community, comprising men of education, men of learning, and men whose learning consists only of what they have themselves seen, heard and experienced — merchants, mechanics, ranchers, bankers, clerks, laborers, sat together, listened attentively to the proof submitted by both sides to the controversy, consulted with one another, and applied their separate learning and experiences of the affairs of life to the facts as proven, and drew a unanimous conclusion in opposition to the contention of the defendant, and substantiated the opinion of the trial judge when he said he deemed it expedient for the jury to decide this case.

In *Atlantic Coast Line R. R. Co. vs. Lindstedt*, 106 C. C. 238, the court says:

"In a case, as here, however, where the plaintiff bases his right of recovery on the unsafe and defective appliances of the defendant, and sets up his own infancy, and the defendant relies as a defense upon the plaintiff's assumption of risk and contributory negligence, and the plaintiff's inexperience, and the defendant's failure to instruct him in his duties, or properly warn him against unusual danger or hazard incident thereto appearing, then, in such case, it at once becomes material to determine whose negligence really brought about the disaster, that of the plaintiff in not properly performing the duties required of him, or the defendant in failing to perform some duty imposed upon it, which can only be ascertained from a full consideration of all of the facts and circumstances surrounding the occurrence; *and the jury is the proper tribunal to settle disputed issues of fact thus arising, if any there be, as in any other case.* * * *

In this case disputed questions of fact having arisen as to the *suitableness and safety of the appliances furnished by the defendant to the plaintiff*, with which to perform the service required of him, and the necessity for the use thereof by plaintiff when injured, as well as over the plaintiff's capacity properly to perform the service in hand, in the light of his youth, knowledge and experience, and whether, because thereof, and from lack of instruction and proper warning, he either did not know of the danger in which he was placed, or, if apprehended, it was *not appreciated* by him, and as to all of which there was a considerable conflict in the testimony, it was *manifestly proper for the trial court to overrule the motion for non-suit, and to instruct a verdict for the defendant*, and to submit the same to the jury under proper instructions as to the

law applicable to the case, which was done, with such degree of fairness to the defendant, that no objection thereto was made by it, though the plaintiff excepted to the rejection of sundry requests for charge to the jury asked by him. Under these circumstances, a verdict having been returned for the plaintiff, which has met with the approval of the trial judge who saw and heard the witnesses testify, and was therefore peculiarly able to judge of the weight that should have been given by the jury to their several statements, this court would not be justified in disturbing the judgment thus entered, particularly on a motion to either withdraw the case from the jury, when the view of the testimony most favorable to the plaintiff must be taken."

Kreigh vs. Westinghouse Co., 214 U. S. 249, 253, 29 Sup. Ct. 619, 53 L. Ed. 984, *supra.*

The C. C. A. 9th Ct. in *Railroad vs. Lundberg*, 100 C. C. A. 323, holds that:

"Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. *The question of assumption of risk also involved consideration of the facts and circumstances adduced upon the trial, and was properly submitted to the jury.*"

Second Assignment of Error.

The defendant states (Brief p. 42) that the witness, Mr. Savage, was not shown to have any qualifications or any knowledge or experience in the

business sufficient to enable him to form an opinion as to the custom for companies to guard cogs of this sort. The witness testified:

"Since I have been in the West it has been mostly around mines, until here for the last twenty years I have been with the Great Northern, principally in putting in machinery for them, that is, *around mixers* and gravel machines and compressors and general construction and so forth, until here in the last four or five years I have not been with them."

Q. You know a good deal about concrete mechinery then?

A. I ought to, I have been at it long enough. (Stenographer Trans. of Ev. p. 64.)

It is submitted that this testimony of this witness was such as to establish him as an expert, and this view of it seems to have been taken by the trial judge.

The answer of the witness to the question: "Mr. Savage, is it customary for companies to guard cogs of that sort?" that "It has been in all my cases," is truly responsive, since it comprehends all of the knowledge the witness has on the subject. The assertion is made that as this case was tried as at common law, "it became wholly immaterial as to what the custom was."

As was stated in *Shaw vs. Woodland Shingle Co.*, 61 Wash. 56:

"It is further contended that respondent was permitted to show that other mills and more modern

mills were not equipped with guards. It is not contended that a compliance with the statute, Rem. & Bal. Code, Sec. 6587, can be excused by showing that other mills had not complied with the provisions of the law: but where, as in this case, the question of practicability was a direct issue before the jury, it cannot be held to be error, where the opinions of skilled persons are offered to prove the custom, although it may develop upon their examination that other mills with which they are acquainted and upon which their opinions are based have not found guards to be practicable." * * *

"We think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripsaws; not that a compliance with the particular custom would necessarily exonerate, or noncompliance necessarily charge it with negligence; but its conduct in that regard was a material fact for the consideration of the jury, in connection with other facts and circumstances developed by evidence in the case." * * *

On the question whether the employer has exercised reasonable and ordinary care in providing and maintaining safe appliances, and places for work, the plaintiff may show the general practice of other employers in similar lines of employment in these respects.

Olesen vs. N. O. Lumber Co., 119 Fed. 77.

Spiro vs. Fellon, 73 Fed. 91.

Crocker vs. Co., 34 Wash. 191.

In the case *Ohio Copper Mining Co. vs. Hutchings*, 172 Fed. 201, the court says:

"A witness of eighteen years' experience in mining, twelve or fourteen of which was as a timberman, testified to what was customarily or usually done in mines to support treacherous and unstable ground and to protect the miners therefrom, and then he was allowed to compare the ordinary practice with what he observed at the point of the accident. This was admissible. What was ordinarily done in other mines with reference to like conditions, while not the measure of reasonable care, is competent evidence thereof. Another witness of twelve years' experience as a timberman in mines, who was at the place of accident shortly after it happened, and who knew the character of the formation of the hanging wall, was allowed to testify that it was practicable to have supported it with headboard and stull. This was also admitted."

Third Assignment of Error.

The defendant complains of the admission of certain testimony indicating what change in the machine might have been made to render it more safe.

In the case of *New York Biscuit Co. vs. Rouss,* 74 Fed. 611, the local court permitted a witness to describe what danger there was of getting the hands caught in the machine, and what precautions witness had to take to prevent it, and the Circuit Court of Appeals held that it was proper expert evidence.

In *Peterson vs. Johnson,* 70 Minn. 538, a case similar to the case at bar, it was said:

"Assignments of error 11 to 14, inclusive, challenge the correctness of the rulings of the court in permitting plaintiff's witness to testify as to whether a guard could have been placed around the gearing in question and whether it was practicable to place one there. We are of the opinion that the evidence was competent expert evidence, and whether the witness was qualified as an expert to testify as to these matters was, on the evidence, a question of fact for the trial judge."

Thompson, Negligence, Sec. 7752.

With respect to the comment of the defendant relative to the competency of evidence showing that changes had been made in the machinery subsequent to the injury (Brief p. 45), attention is invited to page 174 Transcript, where it will be found that the plaintiff not only did not seek to adduce such testimony but assented to the striking of such when it was unintentionally brought out, and it was stricken.

In the case of *Choctaw O. & G. R. Co. vs. McDade,* 191 U. S. 96, the U. S. Supreme Court said:

"Evidence having been introduced by the railroad company to show by measurements that the waterspout did not constitute danger to brakemen on passing trains, the court permitted plaintiff below to show that changes had been made which might have an effect upon subsequent measurements offered in evidence. The jury were told that nothing could be inferred against the defendant com-

pany by reason of the fact that, after the accident, such reconstruction of the spout was made, and that such change had no bearing upon the issues of the case than to enable the jury to ascertain the value of the measurements offered in evidence. We find no error."

In the case now under consideration, the evidence was stricken.

First Assignment of Error.

Defendant objected to the question asked witness Savage, "Do you know whether the cogwheels and machinery around the motor were guarded or not, Mr. Savage?"

In view of the fact that it was conceded throughout the entire trial of the case that the cogwheels were not guarded, even if the question was immaterial, the overruling of the objection to it was not prejudicial error. The question was not immaterial in that it showed the knowledge of defendant as to ignorance of plaintiff.

We believe we have shown that the theory of the plaintiff in error is wrong and unjust. We feel that this Honorable Court is in entire accord with the United States Supreme Court in holding that men should not be punished for being ignorant and

inexperienced, but that employers should take note of the ignorance and inexperience of their employes and either make the surroundings safe or give warning of the danger.

Inasmuch as the second trial was granted, improperly and contrary to law, for the alleged improper use of the word *"ANY"* in an instruction, and as the court abused its discretion in setting aside the $12,262 verdict, we submit that this Honorable Court should reinstate the first verdict rendered.

Respectfully submitted,

HERBERT W. MEYERS,
CHARLES A. ENSLOW,
Attorneys for Defendant in Error.

No. 2162

United States
Circuit Court of Appeals

For the Ninth Circuit.

ERI THOMPSON and J. M. CUMMINGS,

Appellants,

vs.

J. L. REED,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Territory of Alaska,
Third Division.

FILMER BROS. CO. PRINT, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

E. E. RITCHIE and J. L. REED, Valdez, Alaska, Attorneys for J. L. Reed, Plaintiff and Appellee.

S. O. MORFORD, Seward, Alaska, Attorney for Eri Thompson, Defendant and Appellant.

THOMAS R. SHEPARD, Attorney for J. M. Cummings, Defendant and Appellant. [1*]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Amended Complaint.

Plaintiff complains and alleges:

I. That on the 25th day of April, 1910, he recovered judgment against the defendant, Eri Thompson, in this court, for the sum of Fifteen Hundred and Ninety-eight and 60/100 Dollars ($1598.60), which judgment draws interest at the legal rate from date until paid, and costs amounting to Thirty-two and 65/100 Dollars ($32.65), and that said judgment, with costs and accruing costs, is still wholly unpaid and in full force and effect.

II. That on the first day of July, 1910, an execution was duly issued out of this court pursuant to

*Page number appearing at foot of page of original certified Record.

said judgment and thereafter was duly returned by the United States Marshal of this Division wholly unsatisfied, on the 26th day of August, 1910; and thereafter, on the 2d day of September, 1910, an *alias* execution was duly issued out of this court pursuant to said judgment, directed to the United States Marshal of the Third Division of Alaska, to levy upon, seize and take into execution personal property of said Eri Thompson in said Third Division sufficient to satisfy said judgment and costs, and if a sufficient personal property could not be found in said Division to satisfy said judgment, then and in that case to make the amount thereof out of real property belonging to said defendant in said Division, not exempt from execution; and that said [2] *alias* execution was in due course thereafter returned into the clerk's office of this court wholly unsatisfied, said return alleging that no property of said Eri Thompson could be found in said Third Division subject to execution and levy.

III. Plaintiff further alleges that on or about the 22d day of May, 1910, a certain paper writing purporting to be a deed of conveyance and which was in form a deed of conveyance, purporting to convey from the defendant Eri Thompson to the defendant J. M. Cummings certain real and chattel property, the same being then and now the property of the defendant Eri Thompson, was filed for record in the office of the Recorder of Cook Inlet Precinct, at Susitna, Alaska, and was thereafter duly recorded in the records of said office. The property purported to be sold and conveyed by said purported deed was

described therein as follows, to wit:

That certain placer mining claim known as the Battle Ax, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson & Price's saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon was situated.

That certain log house adjacent to John Jones' bath-house, and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party and also that certain log cabin situated in the rear of said log house, with all chattels therein contained.

IV. Plaintiff alleges that said purported deed was not made in good faith nor for any valid consideration, but was a device for, [3] and was made and received with, the intention of placing the property of said Thompson beyond the reach of creditors, and particularly this plaintiff, and for the purpose of hindering, delaying and defrauding this plaintiff in the collection of his said judgment, and that said purported sale and conveyance were made and accepted in consummation of a combination and conspiracy between said Thompson and said Cummings to defraud plaintiff and other creditors; that said deed was made many months prior to the recovery of plaintiff's judgment in this court against said

Thompson but long after the action to recover the same was filed, but said deed was not recorded nor filed for record until nearly a month after said judgment was rendered in this court and until a transcript of said judgment had been sent by plaintiff's attorney in said action to the United States Commissioner and ex-officio recorder of asid Cook Inlet Precinct at Susitna, wherein said property was situated, to be recorded in the records of said precinct, in order that said judgment might become a lien upon the real property of the defendant Eri Thompson situated in said precinct, as provided by law; that said purported deed of conveyance from said Eri Thompson to said J. M. Cummings was thereupon filed for record in the office of the recorder of said precinct about three hours before the filing of the transcript of plaintiff's judgment, according to the filing record in said office.

V. Plaintiff alleges that the defendant J. M. Cummings has never taken possession of any of said property described in said purported deed, real or personal, but that the same has remained in the custody and under the control of said Eri Thompson, who has at all times exercised the rights of ownership of the same, and said Eri Thompson is now in complete possession and control of all of said property.

VI. Plaintiff alleges that the judgment referred to in paragraph I of plaintiff's amended complaint was a judgment recovered by plaintiff in this court in cause Number 233, entitled Thomas H. Meredith versus Dave Wallace and Eri Thompson, copartners as Wallace & [4] Thompson, and against Dave

Wallace and Eri Thompson, copartners, jointly and severally.

Plaintiff further alleges on information and belief that Dave Wallace departed from the Territory of Alaska on or about the month of October, 1907, and that he has not returned to the said Territory since said date. That he departed from the Territory of Alaska for the purpose of defrauding and defeating plaintiff in the collection of his claim upon which this Court rendered judgment in favor of plaintiff and for the further purpose of hindering, delaying and defrauding the plaintiff in the collection of the same. That Dave Wallace has no property, real or personal, in the Territory of Alaska or elsewhere known to plaintiff out of which plaintiff could satisfy this judgment and that the said Dave Wallace is insolvent.

VII. Plaintiff alleges that the personal property reconveyed to the defendant Eri Thompson by J. M. Cummings as set forth in paragraph III of defendant Cummings' answer was mortgaged by the said Thompson on the 14th day of July, 1910, to one W. Murphy. That said mortgage was recorded in the office of the recorder at Susitna, Alaska, on the 15th day of July, 1910.

That said mortgage and deed heretofore set forth were given and made for the purpose of hindering, delaying and defrauding plaintiff in the collection and satisfaction of plaintiff's judgment herein. That said mortgage and deed transferred all of the property, real and personal, of the defendant Eri Thompson in the Territory of Alaska or elsewhere

known to plaintiff, and out of which he could satisfy his judgment herein, and that the said Eri Thompson is insolvent.

VIII. That plaintiff on information and belief alleges that neither Dave Wallace nor Eri Thompson have any other property, real or personal, individual or partnership, other than that transferred by Eri Thompson to J. M. Cummings and by Eri Thompson mortgaged to W. Murphy heretofore described out of which he could secure the payment and [5] satisfaction of his judgment herein.

IX. That plaintiff has no plain, speedy and adequate remedy at law.

WHEREFORE plaintiff prays for a decree of this Court declaring said purported deed of conveyance from the defendant Eri Thompson to the defendant J. M. Cummings to have been without any consideration and made in fraud of creditors of said Eri Thompson, and that the same be vacated, set aside and held for naught; and that the property therein described be decreed to be still the property of said Eri Thompson; and subject to the lien of plaintiff's said judgment against said Eri Thompson, and that in the meantime the said defendants, and each of them, be restrained and enjoined from alienating or attempting to alienate or transfer or encumber the said property, or any part thereof, until the hearing of this cause and for all equitable relief.

J. L. REED,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,
Third Judicial Division,—ss.

J. L. Reed, being duly sworn, deposes and says: That he is the plaintiff's attorney in the above-entitled action, that he has read the foregoing Amended Complaint and knows the contents thereof, and believes the same to be true; that he makes this verification for the reason that plaintiff is several hundred miles distant from the seat of this Court, and that all of the material allegations of this complaint are within affiant's personal knowledge.

J. L. REED.

Subscribed and sworn to before me this 21st day of April, 1911.

[Notarial Seal] L. V. RAY,
Notary Public. [6]

I certify that the foregoing is a full, true and correct copy of the Amended Complaint in the above-entitled action.

J. L. REED,
Attorney for Plaintiff.

Service of a copy of the within Amended Complaint on this 21st day of April, 1911, is hereby acknowledged.

S. O. MORFORD,
Attorney for J. M. Cummings.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 22, 1911. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [7]

In the District Court in and for the Territory of Alaska, Third Judicial Division.

S.—9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Demurrer [of J. M. Cummings] to Amended Complaint.

Comes now the defendant J. M. Cummings, by his attorney, S. O. Morford, and demurrers to the Amended Complaint herein, and for cause of demurrer states:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against the defendant, J. M. Cummings.

II.

That said amended complaint does not state facts sufficient to entitle the plaintiff to equitable relief, or any relief, against this defendant.

Wherefore, this defendant prays that he may be hence dismissed with his costs.

S. O. MORFORD,

Attorney for Defendant J. M. Cummings.

Service of a copy of the within demurrer to amended complaint is hereby accepted this 26th day of April, 1911.

J. L. REED and
E. E. RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 26, 1911. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [8]

In the District Court in and for the Territory of Alaska, Third Judicial Division.

#S.—9.

THOMAS H. MEREDITH,

Plaintiff.

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Demurrer [of Eri Thompson] to Amended Complaint.

Comes now the defendant, Eri Thompson, by his attorney, S. O. Morford, and demurrers to the Amended Complaint herein, and for cause of demurrer states:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against the defendant Eri Thompson.

II.

That said amended complaint does not state facts sufficient to entitle the plaintiff to equitable relief, or any relief, against this defendant.

Wherefore, this defendant prays that he may be hence dismissed with his costs.

S. O. MORFORD,

Attorney for Defendant Eri Thompson.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 15, 1911. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [9]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Minute Order Overruling Demurrers, etc.

Now on this day, this matter coming on to be heard upon defendants' demurrers to the amended complaint on file herein, Reed and Ritchie appearing as attorneys on behalf of the plaintiff and S. O. Morford, Esq., appearing as attorney on behalf of the defendants, and after argument had and the Court, being fully advised in the premises, overrules said demurrer, to which order and ruling defendants except and exception allowed and

IT IS FURTHER ORDERED that defendants have until November, 1911, to answer or otherwise plead herein.

The above is a Minute Order found at page 356, Journal 6, under date September 25, 1911. [10]

In the District Court in and for the Territory of Alaska, Third Division.

S.—9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Answer of J. M. Cummings to Amended Complaint.

Comes now J. M. Cummings, one of the defendants in the above-entitled action, answering separately and for himself alone unto the complaint on file herein:

I.

Answering unto the Third paragraph in plaintiff's amended complaint contained, states:

That on or about the 25th day of October, 1909, this defendant purchased from defendant Eri Thompson that certain placer mining claim, known as the "Battle Axe," located on Thunder Creek, a tributary to Cache Creek, in Cook Inlet Mining and Recording Precinct;

Also an undivided one-half (½) interest in and to that certain saloon building situated in the town of Susitna, Alaska, known as Thompson and Price's saloon, together with and including all fixtures, cigar and liquor licenses;

Also that certain log house adjacent to John Jones' bath-house, and lying between said bath-house and the general merchandise store of H. W. Nagley, in

said Susitna, together with all the fixtures and chattels therein contained, owned by said Eri Thompson;

Also that certain log cabin situated in the rear of said log house, with all chattels therein contained, comprising all the property mentioned in said Third paragraph in plaintiff's amended complaint contained, and paid said Eri Thompson therefor, One Thousand Five Hundred Dollars ($1500) in full for said properties; [11]

And that then and there, defendant Eri Thompson executed to this defendant a deed therefor, and delivered possession thereof to this defendant, and ever since that time this defendant has been, and now is the lawful owner, and in lawful possession of all of said property, save and except as hereinafter stated:

That on the 22d day of May, 1910, this defendant recorded said deed of conveyance in the recording office of Cook Inlet Precinct, at Susitna, Alaska, the recording precinct wherein said property is situate.

This defendant denies that said property, so conveyed by Eri Thompson to this defendant, was on the 22d day of May, 1910, or is now, or has been at any time since the 25th day of October, 1909, the property of the said Eri Thompson, or that he has had any interest therein, or possession thereof, at any time since the 25th day of October, 1909, save and except as hereinafter stated.

This defendant avers that on or about the 15th day of February, 1910, he sold and delivered to defendant Eri Thompson all his interest in and to the

saloon stock and licenses in that saloon commonly known as Thompson & Price's saloon, at Susitna, Alaska, and rented the saloon building and other buildings purchased by this defendant from said Eri Thompson on the 25th day of October, 1909, and described in the Third paragraph in plaintiff's amended complaint contained, to the said Eri Thompson, for and at the rental sum of Twenty-five Dollars ($25) per month; and that since that time the said Eri Thompson has had no interest, right or title therein, other than as tenant of this defendant.

II.

Answering unto the Fourth paragraph in plaintiff's amended complaint contained, this defendant denies that said deed and conveyance mentioned in paragraph Three of plaintiff's amended complaint, was not made in good faith and for a valid consideration; denies that it was a device for, and was made and received with the intention of placing the property of defendant Eri Thompson beyond the reach of creditors; denies that said deed was executed for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment; denies that said purported sale and conveyance were made and accepted in consummation of [12] a combination and conspiracy between this defendant and defendant Thompson to defraud plaintiff and other creditors, or in fraud of any person or persons whomsoever.

III.

This defendant answering unto the Fifth paragraph in plaintiff's amended complaint contained

denies the same and the whole thereof.

IV.

Answering unto the Seventh paragraph in plaintiff's amended complaint contained, this defendant has no knowledge, information or belief as to the truth of the matters set forth in said Seventh paragraph, and therefore denies the same and the whole thereof.

This defendant further answering unto plaintiff's amended complaint on file herein, alleges:

I.

That, on the 25th day of October, 1909, he purchased from defendant Eri Thompson all his right, title and interest in and to all the property mentioned in plaintiff's amended complaint, for a valuable consideration of One Thousand Five Hundred Dollars ($1,500), lawful money of the United States of America, and that on or about the 15th day of February, 1910, this defendant sold and reconveyed to defendant Eri Thompson the undivided one-half (½) interest in and to the stock of goods, licenses and saloon business mentioned in paragraph three of plaintiff's amended complaint, and delivered immediate possession thereof to defendant Eri Thompson.

II.

This defendant alleges and avers that he has no knowledge or information that defendant Eri Thompson was, on October 25, 1909, indebted to any person or persons whomsoever, or that said defendant Thompson sold this defendant the property mentioned in plaintiff's amended complaint, or any of it, for the purpose of defrauding, hindering or de-

laying the plaintiff, or any person or persons whomsoever. [13]

III.

That plaintiff's amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

IV.

That plaintiff's amended complaint does not state facts sufficient to entitle plaintiff to equitable relief against this defendant, or any relief.

V.

That plaintiff's amended complaint does not state facts sufficient to give the Court jurisdiction of the cause.

Wherefore this defendant prays that he may be hence dismissed with his costs.

S. O. MORFORD,
Attorney for Defendant J. M. Cummings.

United States of America,
Territory of Alaska,—ss.

J. M. Cummings, being first duly sworn, says: That he is one of the defendants in the above-entitled action; that he has read the above and foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

J. M. CUMMINGS.

Subscribed and sworn to before me this 24 day of October, A. D. 1911.

[Seal] S. O. MORFORD,
Notary Public for Alaska.

Service of copy acknowledged this 27th day of October, 1911.

E. E. RITCHIE,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 27, 1911. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [14]

In the District Court in and for the Territory of Alaska, Third Division.

S.—9.

THOMAS H. MEREDITH,
Plaintiff.

vs.

ERI THOMPSON and J. M. CUMMINGS,
Defendants.

Answer of Defendant Eri Thompson to Amended Complaint.

Comes now Eri Thompson, one of the defendants in the above-entitled action, and answering personally and for himself alone unto plaintiff's amended complaint herein:

I.

Answering unto the Third paragraph thereof, denies that he was the owner, or had any interest in the property described in said third paragraph in plaintiff's amended complaint contained, on May 22, 1910, or at any other times since October 25, 1909, save and except an undivided one-half interest in the stock, liquors and licenses in what is known as the Thompson and Price saloon, which said undivided

one-half interest was at all times since about the 25th day of February, 1910, up to and including the 19th day of May, 1911, the property of this defendant, and in his possession.

II.

Answering unto the Fourth paragraph in plaintiff's amended complaint contained, this defendant denies that said deed and conveyance mentioned in paragraph three of plaintiff's amended complaint, was not made in good faith and for a valid consideration; denies that it was a device for, and was made and received with the intention of placing the property of this defendant beyond the reach of creditors; denies that said deed was executed for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment, or at [15] all; denies that said purported sale and conveyance were made and accepted in consummation of a combination and conspiracy between this defendant and defendant Cummings, to defraud plaintiff and other creditors, or in fraud of any person or persons whomsoever.

III.

Answering unto the Fifth paragraph in plaintiff's amended complaint contained, this defendant denies that defendant J. M. Cummings has never taken possession of any of said property described in plaintiff's amended complaint, and avers that defendant J. M. Cummings has been the owner and in possession of all of said property described in plaintiff's amended complaint, since the 25th day of October, 1909, and this defendant is informed and believes

that said Cummings is now the owner of all of said property, save and except the undivided one-half interest in the stock of goods and licenses in what is known as Thompson and Price's saloon.

IV.

Answering unto the Seventh paragraph in plaintiff's amended complaint contained, this defendant denies that a mortgage made by this defendant to W. Murphy was made for the purpose of hindering, delaying or defrauding plaintiff in the collection of his judgment, or in fraud of any person or persons whomsoever, and alleges that the same has been fully paid and satisfied.

V.

This defendant further answering unto plaintiff's amended complaint, alleges:

1. That this defendant sold all of said property mentioned in plaintiff's amended complaint, about the 25th day of October, 1909, to J. M. Cummings, one of the defendants herein, for the sum of Fifteen Hundred Dollars ($1,500), lawful money of the United States of America, which sum was fully paid. [16]

2. That on or about February 15, 1910, this defendant repurchased from defendant Cummings the undivided one-half interest in the saloon stock and business, heretofore conveyed on October 25, 1909, to defendant Cummings, and immediately thereafter went into possession thereof, and continued to own and remain in possession of the same until the 19 day of May, 1911.

VI.

This defendant further avers:

1. That at no time was he indebted to Thomas H. Meredith or his assignors, in any sum whatever, and at no time was he in partnership with Dave Wallace in the mining business;

2. That the judgment secured against this defendant was secured by fraud, perjury and mistake;

3. That at the time this defendant made the sale to J. M. Cummings, set forth in plaintiff's amended complaint, and for a long time prior thereto, this defendant had been at Valdez, Alaska, endeavoring to secure a trial of the cause of Meredith vs. Thompson and Wallace, that plaintiff was not ready for trial, and would not consent to the trial of said cause, and that this defendant was informed by his attorney that no just cause of action existed against him;

4. That this defendant sold the property mentioned in plaintiff's amended complaint to the defendant J. M. Cummings for full value, and at a time when this defendant did not owe any debts in the Territory of Alaska, except on saloon stock which Cummings assumed.

Wherefore, this defendant prays that he be hence dismissed with his costs.

S. O. MORFORD,
Attorney for Def. Eri Thompson.

United States of America,
Territory of Alaska,—ss.

Eri Thompson, being first duly sworn, says, that he is one of the defendants in the above-entitled action; that he has read the [17] above and forego-

ing Answer, knows the contents thereof, and that the same is true, as he verily believes.

ERI THOMPSON.

Subscribed and sworn to before me this 23 day of October, A. D. 1911.

[Notarial Seal] H. W. NAGLEY,

Notary Public in and for the Territory of Alaska, Residing at ———.

Service of copy acknowledged this 10th day of January, 1912.

E. E. RITCHIE,
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jan. 11, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [18]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

versus

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Reply [to Answer of J. M. Cummings].

Comes now Thomas H. Meredith, the plaintiff herein, and replying to the answer of the defendant J. M. Cummings to the Amended Complaint herein, setting forth an affirmative defense, says:

I.

Plaintiff replying to the first and second paragraphs of the Answer containing new matter, says that he has not knowledge or information sufficient to form a belief as to the new matter contained therein, therefore denies each and every allegation thereof.

J. L. REED, and
E. E. RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

J. L. Reed, being duly sworn, deposes and says that he is the plaintiff's attorney in the above-entitled action; that he has read the foregoing Reply and knows the contents thereof, and he believes the same to be true; that he makes this verification for the reason that plaintiff is several hundred miles distant from the seat of this court, and that all the material allegations of this reply are within affiant's personal knowledge.

J. L. REED. [19]

Subscribed and sworn to before me this 14th day of February, 1912.

[Notarial Seal] L. V. RAY,
Notary Public for Alaska.

I certify that the foregoing is a full, true, and correct copy of the Reply in the above-entitled action.

J. L. REED,
Attorney for Plaintiff.

Service of a copy of the within Reply on this 14 day of February is hereby acknowledged.

S. O. MORFORD,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [20]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Reply and Demurrer [to Answer of Eri Thompson].

Comes now Thomas H. Meredith, the plaintiff herein, and replying to the answer of the defendant Eri Thompson to the Amended Complaint herein, setting forth an affirmative defense, says:

I.

Plaintiff replying to the Fifth paragraph and subdivisions One and Two thereof in the Answer containing new matter says that he has not knowledge or information sufficient to form a belief as to the new matter contained therein, therefore denies each and every allegation thereof.

II.

Plaintiff demurs to the new matter set forth in the

Sixth paragraph and subdivisions 1, 2, 3, and 4 thereof, for the reason that it appears upon the face thereof that such new matter does not constitute a defence or counterclaim.

J. L. REED and
E. E. RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

J. L. Reed, being duly sworn, deposes and says that he is the plaintiff's attorney in the above-entitled action, that he has read the foregoing Reply and knows the contents thereof, and he believes the same to be true; that he makes this verification for the reason that plaintiff is several hundred miles distant from the seat of this [21] court, and that all the material allegations of this reply are within affiant's personal knowledge.

J. L. REED.

Subscribed and sworn to before me this 14th day of February, 1912.

[Notarial Seal] L. V. RAY,
Notary Public for Alaska.

I hereby certify that the foregoing is a full, true and correct copy of the Reply in the above-entitled action.

J. L. REED,
Attorney for Plaintiff.

Service of a copy of the within Reply on this 14 day of February is hereby acknowledged.

S. O. MORFORD,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [22]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

J. M. CUMMINGS and ERI THOMPSON,

Defendants.

Order Striking Part of Answer of Eri Thompson.

This cause coming on to be heard before the Court this 16th day of February, 1912, upon plaintiff's demurrer to the sixth defense of the answer of Eri Thompson, defendant, plaintiff appearing by his attorneys, J. L. Reed and E. E. Ritchie, and defendants appearing by their attorney, S. O. Morford, after argument by counsel it is ordered by the Court that said demurrer be treated as a motion to strike, and that the clauses of said sixth defense numbered in separate paragraphs 1, 2, 3, be stricken from said answer and that the paragraph of said sixth defense numbered 4 be allowed to stand.

Done in open court at Seward, Alaska, this 16th day of February, 1912.

EDWARD E. CUSHMAN,

Judge.

CLERK'S NOTE:

Offered for filing and entering Feb. 17, 1912. Entered Court Journal No. S. 1, page 111.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 17, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [22½]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Reply to Eri Thompson's Answer to Amended Complaint.

Replying to the fourth subdivision of the sixth defense set up by the defendant Eri Thompson in his answer to plaintiff's amended complaint, plaintiff says:

That he denies each and every, all and singular, the averments and allegations therein contained.

J. L. REED and
E. E. RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

J. L. Reed, being duly sworn, deposes and says, that he is plaintiff's attorney in the above-entitled suit; that he has read the foregoing reply and knows the contents thereof, and he believes the same to be true; that he makes this verification for the reason

that plaintiff is several hundred miles distant from the town of Seward, where the cause is now set for trial, and that all the material allegations of this reply are within affiant's personal knowledge.

J. L. REED.

Sworn to and subscribed before me this 16th day of February, 1912.

[Notarial Seal] L. V. RAY,
Notary Public. [23]

I certify that the foregoing is a full, true and correct copy of the Reply in the above-entitled action.

J. L. REED,
Attorney for Plaintiff.

Service of a copy of the within Reply on this 16th day of February is hereby acknowledged.

S. O. MORFORD,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [24]

In the District Court in and for the Territory of Alaska, Third Division, Holding Terms at Seward.

No. S. 9.

THOMAS H. MEREDITH,
Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,
Defendants.

Affidavit for Continuance.

United States of America,
Territory of Alaska,—ss.

S. O. Morford, being first duly sworn, deposes and says: That he is the attorney for J. M. Cummings in the above-entitled cause;

That Eri Thompson, one of the defendants in said cause, resides at Susitna, Alaska, about 175 miles distant from Seward, Alaska;

That no communication can be had between Seward and Susitna, other than by mail once a month;

That it was understood that Eri Thompson would leave Susitna and arrive in Seward, before February 1st, 1912;

That affiant is informed that said Eri Thompson, sometime in the month of January, this year, met with an accident which caused him to be confined to his bed, through an injury to his back;

That he was confined to his bed at the date when the last mail left Susitna for Seward, which was about January 25, 1912, since which time no information has been received by affiant as to said Eri Thompson;

That said Thompson is an important witness in behalf of defendant Cummings;

That if said Thompson were present here, he would testify that he left Susitna, Alaska, in September, 1909, and did not return until February, 1910; [25]

That he acquired the interest of J. M. Cummings in the saloon business at Susitna, Alaska, in January,

1910, being the same business and interest sold to said Cummings by himself (Thompson) in 1909;

That he owned an undivided one-half interest in the license and saloon business from January, 1910, until October, 1910;

That since October, 1910, he has not been interested in, nor has he conducted a saloon at Susitna or elsewhere;

That said Thompson would testify that, on or about May 22, 1910, he received from Joe Beedy, a deed of conveyance executed by himself to J. M. Cummings, dated October 25, 1909, conveying the property in controversy to J. M. Cummings, and that Joe Beedy, at the time, stated to him that J. M. Cummings had sent the deed from Knik for record, and requested that he, Thompson, would place it of record for Cummings;

That said Eri Thompson would further testify that H. S. Farris left Susitna, Alaska, about September, 1909, and did not return to Susitna again until February, 1910.

That said Thompson would further testify that he sold the property described in the complaint in this cause to J. M. Cummings in October, 1909, for the sum of $1,500.00, $500.00 of which was in cash, and $1,000.00 in debt owing by Thompson to Cummings;

That the sale of the saloon interest was subject to the outstanding debts and accounts for stock purchased;

That in January, 1910, he repurchased the interest in the saloon stock and license, subject to the outstanding debts and accounts against the saloon, and

went into possession of the same, and was the owner of the undivided one-half interest, until October, 1910;

That he sold the property mentioned in the complaint to defendant Cummings for full value;

That he owed no debts at the time, other than those upon the stock of the saloon, which were assumed by defendant Cummings; [26]

That at the time he made the sale of said property he had no idea that any judgment would be recovered against him in the suit pending, wherein Thomas Meredith was plaintiff and Dave Wallace and Eri Thompson were defendants;

That the cause of Meredith vs. Wallace and Thompson was at issue and ready for trial at Valdez in October, 1909;

That he waited in Valdez until November, 1909, for trial of said cause;

That if said cause had been tried at that term of court, and judgment had been rendered against him, he had sufficient means to have paid the judgment, and would have paid the same;

That the debt for which the judgment was obtained was contracted by Dave Wallace without the authority, and without the knowledge of said Eri Thompson, and many months after the time that Dave Wallace and Eri Thompson had dissolved partnership;

That he made the sale to said Cummings in good faith and without intention to defraud any person whomsoever;

That there was no understanding between defendant Cummings and himself that the sale was made

for any other purpose than for value, which was paid, and that he (Thompson) has had no interest in the property in controversy, since October 25, 1909, except the stock of goods and license repurchased from defendant Cummings in January, 1910;

That said Eri Thompson would further testify that he worked the mining claims in controversy, during the summer of 1909, and that the expenses exceeded the amount taken from the claims.

S. O. MORFORD.

Subscribed and sworn to before me this 16th day of February, A. D. 1912.

CURTIS R. MORFORD,
Notary Public in and for the Territory of Alaska,
Residing at Seward.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [27]

CLERK'S NOTE:

Original page 28 was carried forward and made 22½ in order that pleadings would come chronologically. [28]

Filed in the District Court, Territory of Alaska, Third Division. Jun. 22, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. S—9.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Bill of Exceptions and Transcript of Evidence.

Be it remembered, That the above-entitled cause came on duly and regularly to be heard before the Honorable EDWARD E. CUSHMAN, Judge of said Court, at Seward, Alaska, in said Third Division, on Saturday, the 17th day of February, 1912:

The plaintiff herein being represented by J. L. Reed, Esq., and E. E. Ritchie, Esq., his attorneys and counsel.

The defendants being represented by S. O. Morford, Esq., their attorney and counsel.

Opening statements were made to the court on behalf of the plaintiff by Judge Reed and on behalf of the defendants by Mr. Morford:

Whereupon the following additional proceedings were had: [29]

Mr. REED.—We desire to offer in evidence the judgment which is based upon the Findings of Fact and Conclusions of Law in Case #233 of this court, entitled Thomas H. Meredith vs. Dave Wallace and Eri Thompson, also the executions which are issued upon that judgment and the returns thereof, as

shown by the files in that case.

(They are admitted and marked Plaintiff's Exhibit "A"—copies are attached hereto and made a part hereof.)

By the COURT.—I understand that your offer includes the execution and alias execution?

Judge REED.—Both of the executions issued on the judgment in that cause.

Judge REED.—We now offer in evidence the quitclaim deed, a certified copy of it, upon which the action is based—a quitclaim deed from Thompson to Cummings quitclaiming, as we allege, all his property both real and personal.

(It is admitted, without objection, marked Plaintiff's Exhibit "B," and read to the Court by Judge Reed. Copy is attached hereto and made a part hereof.)

Judge REED.—We next offer in evidence a transcript of our judgment, showing that it has been filed for record and the date of filing, which we claim would create a lien upon the real property of the defendant Eri Thompson in the Cook Inlet recording precinct.

(It is admitted without objection, and marked Plaintiff's Exhibit "C." Judge Reed reads it to the Court.)

Judge REED.—At this time I desire to introduce in evidence two calendars of the year 1910, showing that the 22d day of May was on Sunday—that both of these papers were filed for record on the Sabbath. [30]

(Both calendars are admitted and marked Plaintiff's Exhibit "D.")

Judge REED.—I now desire to offer in evidence the mortgage of Thompson to W. Murphy, a certified copy of it.

Mr. MORFORD.—I object to that as immaterial in this case. It is admitted that there was a mortgage, and in the Answer of Thompson it is alleged that it has been paid and satisfied. I also object to the introduction in evidence of the alleged mortgage, as it is shown on the face of the mortgage that it is void between the parties and not entitled to record—even if the facts set forth are true, it would not protect the property from execution, in that it is not executed as required by the statute, that both mortgagor and mortgagee ever made it in good faith.

By the COURT.—It is not offered for that purpose—it is not offered as a binding effective mortgage—objection overruled.

(To which ruling of the Court counsel for defendants is allowed an exception.)

Judge REED.—This deed of conveyance from Eri Thompson to Cummings made on the 25th day of October, 1909, conveys to Cummings the license and stock of liquors in the saloon at Susitna, and I desire to offer in evidence the license to show that there never was any transfer of the license from Thompson to Cummings—that is, there is no order of the Court making the transfer and that the license still remained in Thompson's name while the right was alleged to have been sold under the deed conveying this interest, and we will show that Cummings conducted the saloon without a license; that he was doing business without a license from October 25, 1909 to

February 15, 1910, when he [31] says he resold the stock, etc.

Mr. MORFORD.—One of the parties was the same,—it was not a transfer of the entire property. Cummings merely purchased the interest of Thompson and the business was conducted without a general order of the Court transferring the license to Cummings, from Price & Thompson to Price & Cummings.

By the COURT.—Is there anything you hope to show that is not covered by the admission of Mr. Morford?

Judge REED.—I think not.

By the COURT.—Then I don't see the necessity of offering them.

Judge REED.—I now offer in evidence the deposition of H. S. Farris, taken on the 4th day of November, 1911, at Susitna, before H. W. Nagley, Notary Public.

(The deposition is admitted and read by Judge Reed as follows:)

[Deposition of H. S. Farris.]

Q. State your name, residence and occupation.

A. H. S. Farris; Susitna, Alaska; United States Commissioner.

Q. State how long you have resided at Susitna, Alaska. A. Three years.

Q. How long have you known Eri Thompson?

A. About three years.

Q. State what occupation Eri Thompson has been engaged in from the time you first became acquainted with him until the present time.

(Deposition of H. S. Farris.)

A. Saloon business.

Q. How long has Thompson resided at Susitna?

A. Three years, to my knowledge. I don't know how long before that.

Q. When did you first know Thompson at Susitna and in what business was he engaged?

A. Three years ago. In the saloon business.

Q. Who were his partners at Susitna, if any? [32]

A. When I first came here Frank Dunn was his partner—later, M. F. Fry; then Hugh Price was his partner.

Q. Where were you on the 25th day of October, 1909? A. Valdez, Alaska.

Q. State whether you took an acknowledgment of a quitclaim deed dated the 25th day of October, 1909, between Eri Thompson, grantor, and J. M. Cummings, grantee, at Valdez, Alaska.

A. I took an acknowledgment of a quitclaim deed from Eri Thompson to J. M. Cummings at Valdez, Alaska. I don't know exact date, but in October some time.

Q. State fully all the circumstances preceding the taking of the acknowledgment.

A. Thompson requested me to draw a deed for him, conveying his interest in the saloon business in Susitna and his placer claim on Thunder Creek.

Q. Was J. M. Cummings present at the time of the taking of the acknowledgment?

A. I am quite sure he was; yes.

Q. After the acknowledgment was taken, state

(Deposition of H. S. Farris.)
what became of the deed, and whether same was delivered in your presence, and to whom?

A. I am not positive. I believe it was delivered to Cummings at the time.

Q. Was anything said by either Thompson or Cummings as to why the deed was made or concerning the property conveyed in the deed? If, so, state fully what was said.

A. Nothing said, that I remember.

Q. After October 25, 1909, did you see Thompson at Susitna? A. Yes.

Q. Did he continue in the same business at the same place after [33] October 25, 1909, as before that time? A. Yes, he was still in the saloon.

Q. What changes did you notice either in the building, stock of liquors or other personal property, manner in which the business was conducted, name under which business was conducted, the persons actually present conducting business, of the saloon business known as Thompson & Price after October 25, 1909? State when those changes were made and by whom.

A. I never noticed any changes, if there were any.

Q. State under what name the business was generally known to have been conducted after October 25, 1909.

A. It was generally spoken of as Thompson & Price.

Q. State whether Thompson was personally present conducting the saloon business after October 25, 1909, and if so, for how long.

A. He reached Susitna in February, 1910, a few

(Deposition of H. S. Farris.)

days after myself; some time during the later part of the month of February, and conducted the saloon business from then until the later part of October, 1911.

Q. Was Cummings ever at Susitna? If so, state when and for how long.

A. He was never here to my knowledge. I did hear that he was here for a day or so,—I was out of town.

Q. Did Cummings ever in person conduct the saloon business known as Thompson & Price at Susitna? If so, state when and for how long.

A. No.

Q. State the exact time when the deed referred to in Question 9 was recorded, and at whose request.

A. I will have to look it up, as I don't remember the exact time it was recorded. It was recorded at the request of Thompson. (Later.) It was recorded May 22, 1910, 8:30 P. M. [34]

Q. Was Cummings at Susitna at the time the deed was recorded? A. No.

Q. State the time when the mail arrived at Susitna on the 22d day of May, 1910.

A. There were two mails arrived May 22, 1910; the first at about 2 o'clock P. M.; the second about 10:30 P. M.

Judge REED.—I will also read the deposition of Hugh Price, taken at the same time and place, before the same notary.

[Deposition of Hugh Price.]

Q. State your name, residence and occupation.

A. Hugh Price; Susitna, Alaska; miner.

Q. How long have you resided in Susitna, Alaska?

A. I arrived here about the 17th of April, 1909, and have been here about ever since.

Q. State whether or not you were ever in partnership in the saloon business with J. M. Cummings; if so, state when, where and how long.

A. I owned one-half interest in the saloon at Susitna with him from October 25, 1909, to October, 1910.

Q. Under what name was the business conducted?

A. I did the business without change.

Q. When did you first enter into partnership in the saloon business with Eri Thompson? State under what name the business was conducted and for how long continued and when dissolved.

A. I entered into the partnership in the saloon with Thompson about August 15, 1909. Business conducted as Thompson & Price. Thompson left in October, about the first, as near as I can remember. Did not come back until February, 1910, and then he took the business back again.

Q. Did you ever own any personal property jointly with J. M. Cummings? If so, state what the same consisted. [35] A. License and liquors.

Q. State accounting you had with Cummings relative to any sales of personal property owned by you jointly with Cummings, when, where and how you made settlements and accountings with him. Have you any written memoranda pertaining to these ac-

(Deposition of Hugh Price.)

countings? If so, file same.

A. We still own the saloon; the stock has been sold.

Q. How often and in what manner did you account with Cummings relative to the losses or profits by reason of any partnership transaction in the saloon business at Susitna?

A. No accountings were made. Thompson bought back Cummings' interest in stock and license in 1910, about February, latter part, and I did business with Thompson.

Q. Did you ever own any real estate jointly with Cummings? If so, state what, and where located.

A. No. We each owned a separate half interest in the saloon.

Q. If you owned real estate jointly, state what arrangements you had with Cummings regarding leasing, where and when arrangements made and whether made with Cummings in person.

A. He looked after his own interest and I looked after mine.

Q. Were the arrangements made with any person acting for Cummings? If so, with whom?

A. No.

Q. If you owned real property jointly with Cummings, state if it was ever rented and who rented same and how often were the rents paid, and how were the rents paid to Cummings for his interest.

A. I gave an option to Ellexson for my half interest in the saloon building, and I saw a lease from Cummings to Ellexson where he had rented the saloon building to Ellexson. I know nothing of how the

rents are paid to Cummings. [36]

Judge REED.—We rest.

Mr. MORFORD.—At this time I wish to move for judgment and dismissal because of failure of proof. The question of fraud to set aside a conveyance is one of fact, and must be proved as other facts are proved. It must be shown that there has been a fraud on the part of the party holding the property. Even though there is an admitted fraud on the part of the party who sold the property, the property would necessarily be properly conveyed to the defendant, if it did not show that the defendant Cummings was a party to the fraud.

After argument the motion was by the Court denied. To which ruling counsel for defendants then and there duly excepted and the exception was by the Court allowed.

Judge REED.—We ask permission to offer in evidence at this time the findings of fact and conclusions of law in Case #233. I intended to include them in my former offer and thought I had done so.

(They are admitted in evidence, marked Plaintiff's Exhibit "F." Counsel for defendants objected to the admission at this time, which objection was overruled and exception allowed.)

AFTERNOON SESSION.

DEFENSE.

Mr. MORFORD.—At this time I desire to read affidavit made by me for a continuance of this action. (Copy of the affidavit is attached hereto and made a part hereof.)

Judge REED.—We move that the Court disregard all of the paragraph reading as follows:

"That the debt for which the judgment was obtained was [37] contracted by Dave Wallace without the authority, and without the knowledge of said Eri Thompson, and many months after the time that Dave Wallace and Eri Thompson had dissolved partnership."

On the ground that each and every part of it is incompetent, irrelevant and immaterial to prove any of the issues in this case.

By the COURT.—In that paragraph, the part reading: "The debt for which the judgment was obtained was contracted by Dave Wallace without the authority"— without the authority will be stricken out because the Court must have found that it was with authority. "And without the knowledge of said Eri Thompson"—that may stand. "And many months after the time that Dave Wallace and Eri Thompson had dissolved partnership"—that will be stricken. That part may stand that has any effect in showing the good faith of the parties.

(The motion for a continuance was by the Court denied. To which ruling of the Court defendants were allowed an exception.)

Whereupon the case was continued until the evening of February 19, 1912, when the testimony of J. M. Cummings, one of the defendants, was taken, as follows: [37½]

[Testimony of J. M. Cummings, for Defendants.]

J. M. CUMMINGS, called and sworn as a witness in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MORFORD.)

Q. What is your name and residence?

A. J. M. Cummings; Seward.

Q. You reside in Seward—how long have you been in Seward? A. Part of the time since 1905.

Q. Have you been in Seward most of the time since?

A. No; I was out about a year and a half during the time since 1905.

Q. You are the defendant in this action of Meredith against Cummings and Thompson, one of the two defendants, are you not? A. Yes, sir.

Q. State to the Court what, if any, property you ever purchased from Thompson.

A. I purchased from Thompson in October, 1909, some property at the station, three different log buildings and houses and some mining ground in Thunder Creek.

Q. Any saloon business or saloon stock?

A. Stock and fixtures and license, half interest.

Q. Half interest in the saloon stock and building?

A. Yes, sir.

Q. What did you pay for the property?

A. $1,500.

Q. How was it paid?

A. I paid $500 in cash and I gave a note I had of his for a thousand dollars that he owed me.

(Testimony of J. M. Cummings.)

Q. Thompson's note? A. Yes, sir.

Q. State for what he owed you that amount of money. [38]

A. He owed it to me for the business he bought me out of, in Katalla—half interest of the business I owned in Katalla.

Q. When did you sell him that? A. 1907.

Q. How much did you sell him the business for at that time?

A. I sold him the half interest I owned, stock and fixtures, for $2,000.

Q. And a note for half and cash half?

A. Yes, sir.

Q. State whether or not there was any arrangement between you and Thompson that he should have any interest in that property after that sale, whether he retained any interest or not.

A. No, sir, there was not.

Q. State whether or not you had any knowledge that he was selling the property to avoid paying his creditors.

A. No, sir, I did not—I bought the property in good faith and thought he sold it to me the same way.

Q. Did you receive a deed for that property?

A. Yes, sir.

Q. I will ask you if this is the deed you received (handing witness paper).

A. Yes, sir, that is the deed.

(The deed is admitted in evidence, without objection, marked Defendants' Exhibit No. 1.)

Q. State whether or not you have had the deed

[Testimony of J. M. Cummings, for Defendants.]

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Q. I will ask you if this is the deed you received (handing witness paper).

A. Yes, sir, that is the deed.

(The deed is admitted in evidence, without objection, marked Defendants' Exhibit No. 1.)

Q. State whether or not you have had the deed

(Testimony of J. M. Cummings.)

recorded. A. Yes, sir.

Q. When and how did you have it recorded?

A. I sent the deed from Knik in May, 1910.

Q. To Knik or from Knik?

A. From Knik, Susitna Station. [39]

Q. How did you send it?

A. By a party that was going around at the time the ice went out of the river.

Q. By whom? A. Joe Beede.

Q. Do you remember the date you sent it?

(Objected to as immaterial—overruled.)

A. I am not sure; I think it was about the 17th or 18th of May; I am not positive.

By the COURT.—What is the date of record?

Mr. MORFORD.—The 22d of May, I think.

Mr. RITCHIE.—The 22d, 11 P. M.

Q. Was there any other opportunity to send it from Knik about that time?

A. I don't think there was; after I went to Knik that spring the trail was pretty well broke up and there was some Indians went over it—I don't remember of any white people going over.

Q. Was this the first opportunity to send it by responsible parties?

A. I think it was as I remember.

Q. Do you remember whether it was returned to you recorded? A. Yes, sir.

Q. How did you receive it?

A. I got it through the mail some time about the first of June.

Q. Do you know who sent it back, whether it was

(Testimony of J. M. Cummings.)

the recording officer?

A. I am not sure, but I think it came from the recording office.

Q. Was the amount that you paid for this property a fair value?

A. I think it was at the time, from the information I had of [40] what was there.

Q. Did you ever sell the property or any portion of it back to Thompson?

A. I sold him a half interest in the stock and license.

Q. When was that?

A. That was in February, 1910.

Q. Was there any particular reason why you sold it to him?

A. He went outside and when I bought his interest over there he expected to go to British Columbia and go into business, but he came back; before he came back I heard from pretty bad reports the way the business was run over at the Station there and he wanted to buy my interest back in the stock and license, and I had a chance to go into business at Knik at the time and I thought it was a better proposition than the station, and I sold him back the interest in the stock and license—wanted him to sell all my interest I had bought of him over there—he said he would have bought it but he didn't have the price.

Q. What did you do with reference to the building, the interest in the saloon building?

A. He paid me rent.

(Testimony of J. M. Cummings.)

Q. How much did he pay you—how much was he to pay you for the rental of that saloon building?

A. Twenty dollars per month, my half interest.

Q. Did he pay that?

A. He paid me up to the time that he sold out.

Mr. REED.—How much?

A. Twenty dollars per month.

Mr. REED.—For your half interest in the saloon?

A. In the building.

Q. He settled with you for that up to what time?

[41]

A. He settled with me up to May 11th.

Q. Since which time who has had the building?

A. Ellixson.

Q. Has he paid you rent for it?

A. He paid me rent up to September, since May.

Mr. MORFORD.—That is all.

Cross-examination.

(By Mr. RITCHIE.)

Q. When did you come to Knik?

A. I went to Knik—I got there on the 19th day of April.

Q. Where did you come from, Seward?

A. Yes, sir.

Q. When did you leave Seward?

A. On the 5th day of April.

Q. How did you go, to the inlet?

A. Went to Seldovia and took a launch up.

Q. You went by boat, by water? A. Yes, sir.

Q. Where were you during the winter of 1909 and 1910?

(Testimony of J. M. Cummings.)

A. 1909 I was in Seward here, in the winter of 1909.

Q. During the entire winter,—were you here during the entire winter?

A. I was in Valdez the month of October and November.

Q. You were in Valdez as a member of the grand jury that term? A. Yes, sir.

Q. And the grand jury was discharged in the early part of November and you returned then to Seward?

A. Yes, sir.

Q. And you were in Seward then continuously, in or near the town, until you left here on the 5th of April to go to Knik? A. Yes, sir, I was. [42]

Q. What were you doing here that winter?

A. I wasn't doing anything.

Q. You went to Knik with George Palmer, did you not? A. Yes, sir.

Q. Did you engage in business with him there?

A. I was working in the saloon for him, in the saloon, and my wife was running the roadhouse.

Q. You were not in partnership with George?

A. No.

Q. When you bought this property from Thompson in October, how long had you been negotiating with him for it?

A. We never negotiated for it until we got to Valdez—we got talking about it; he wanted to go outside.

Q. How long before he made the deed had you been talking about it? A. I think a couple of days.

Q. Not more than that? A. Not more than that.

(Testimony of J. M. Cummings.)

Q. Farris drew that deed, I believe?

A. Yes, sir.

Q. It seems to be typewritten—where did Thompson sign it?

A. In the Seattle Hotel, if I remember right.

Q. Was the deed drawn up in your presence?

A. No, Eri Thompson went to him and had an understanding how he wanted this drawn up and what for, and I think he was rooming in the hotel—I don't know whether he drew it in the hotel or his office.

Q. You think you went up to his room to sign it?

A. No, I didn't sign it.

Q. You were present when it was signed, when Thompson signed it? [43]

A. It was signed in the hotel.

Q. Downstairs? A. Yes, sir.

Q. I see W. T. Scott was one of the witnesses—he was one of the hotel proprietors—this was signed on the hotel desk? A. I think it was; I am not sure.

Q. Was there anybody present but yourself and Thompson and Farris and Scott?

A. I don't think there was.

Q. Was the deed given to you there?

A. Yes, sir.

Q. And what did you do with it?

A. Put it in my pocket.

Q. And carry it until you came to Seward?

A. Yes, sir.

Q. You carried it in your pocket until then?

A. Yes, sir.

Q. And then kept it here in your possession dur-

(Testimony of J. M. Cummings.)

ing the winter? A. Yes, sir.

Q. Who was present when you paid Thompson the $500? A. There wasn't anybody.

Q. Where was that done?

A. We went up in Thompson's room in the hotel.

Q. He roomed in the Seattle hotel? A. Yes, sir.

Q. What kind of money was it you paid him?

A. I paid him in currency, paper money, $500.

Q. All currency? A. Paper money, it was.

Q. And you gave him the note at the same time?

A. Yes, sir. [44]

Q. Where was that note dated? A. Katalla.

Q. When did you dissolve partnership with Thompson at Katalla?

A. I never was in partners with him at Katalla.

Q. Where had you been in partnership with him?

A. I was in partnership with him in 1903 and 4 in Kayak Island.

Q. That is near Katalla?

A. Fourteen or sixteen miles from Katalla.

Q. That was in the summer of 1907?

A. It was in the summer of 1907 that I sold out to him in Katalla.

Q. What time of the year?

A. I sold out to him some time the last of August.

Q. And you came away then?

A. I went below; went to Seattle.

Q. You went outside and remained outside until you came back to Seward a year or two later?

A. I think I remained out until the spring of 1909.

Q. You say he was to pay you $2,000 for your inter-

(Testimony of J. M. Cummings.)

est and you took half of that in this note?

A. Yes, sir.

Q. Did the note draw any interest?

A. No, sir, without interest.

Q. When was it payable? A. One year.

Q. One year after date, without interest?

A. Yes, sir.

Q. Then it was payable about the last of August, 1908? A. Yes.

Q. There never had been any payments made on it? A. Yes, sir. [45]

Q. It was more than a year past due?

A. Over two years when he paid me.

Q. It was two years old, but a little more than a year past due? A. Yes, sir.

Q. And he had never made any payments up to that time?

A. No; he wrote to me if I didn't need the money he would like to get more time on it when it was due.

Q. Did you know anything about Thompson's financial circumstances for the next two or three years after that?

A. No, sir, I never knew anything about his money matters.

Q. Do you know how long he remained there after you sold out? A. At Katalla?

Q. Yes.

A. Some time that winter; I don't remember when he left.

Q. Now, you were here all of the winter of 1909 and 10 from the time you returned from Valdez

(Testimony of J. M. Cummings.)

about the middle of November until the 5th of April —do you know how many mails go from here to Knik during the winter? A. I think there is three.

Q. One on the first day of each calendar month unless it is delayed for some reason, is there not?

A. January, February and March, yes, sir, I think.

Q. That is correct? A. Yes, sir.

Q. Was there any particular reason why you didn't send this deed by mail to be recorded?

A. Nothing more than I expected to go over in the spring and would record it when I went over.

Q. Were you expecting to go over all winter—did you expect in [46] the fall of 1909 that you would come to Knik the next spring?

A. Until February, until I sold to Thompson in February I expected to go.

Q. Do you know anything about how this business was handled up there that winter of 1909 and 10?

A. Why, after Thompson went back in February he was with Price until Price sold out to Ellixson.

Q. The winter of 1909 and 10 how was that business conducted, do you know?

A. I never was over there but once.

Q. Were you ever in Susitna before you sold this property? A. Never had seen it then; no, sir.

Q. How did you know about its value?

A. I was taking Thompson's word a whole lot and heard other fellows say what there was over there and what business there was.

Q. And you just took a chance at it?

A. I was taking a chance—most of my idea in buy-

(Testimony of J. M. Cummings.)

ing an interest was to get into business.

Q. Your intention at that time was to go to Susitna? A. Yes, sir.

Q. And go into business the next spring?

A. Yes, sir.

Q. You could have got in over the trail that fall?

A. I didn't think it was worth while—I heard it was quiet that winter.

Q. Do you know who was in charge of the place that winter? A. The winter of 1909?

Q. Yes. A. Price. [47]

Q. Did you know Price?

A. I saw him; I never was very well acquainted with him.

Q. Did you get any reports from Price that winter as to the progress of the business?

A. I wrote to Price after I bought, about the transaction, and that I would be over in the spring.

Q. When you bought this saloon did you get any inventory from Thompson as to what it contained?

A. He gave me a rough estimate of the stock on hand and what the outstanding debts were.

Q. What did he say the outstanding debts were?

A. The outstanding debts were, if I remember right, between seventeen and eighteen hundred dollars.

Q. What was that—that was due to outside liquor houses? A. Yes, sir.

Q. Was the stock worth that?

A. He figured that there was twenty-five or twenty-six hundred dollars.

(Testimony of J. M. Cummings.)

Q. This was simply open accounts, wasn't it, this indebtedness of seventeen or eighteen hundred dollars was simply open accounts?

A. It was accounts, the business end over there.

Q. There was no mortgage on it or anything of that kind? A. Yes, sir.

Q. And you assumed and agreed to pay half of that?

A. I assumed and agreed to pay half of that, and get half the profits in the spring when I went over.

Q. Did you know anything about this mining property of Thompson's?

A. Only what I heard and Thompson told me and from men I knew that worked on the railroad that I talked to. [48]

Q. Have you ever been on the mining property?

A. No, sir.

Q. What have you received from that mining property since you bought it? A. What royalties?

Q. Yes.

A. In the summer of 1910 I received 26½ ounces.

Q. From whom? A. Al Harper.

Q. You let a lay on that property to the Harper Brothers? A. To Al Harper.

Q. When was that—June? A. In June.

Q. Where?

A. Why, I signed the lay in Knik, the lease.

Q. And the arrangement was made there, was it, at Knik?

A. No, I think it was made at the station; it was sent over to me to sign. I think that Harper had the

(Testimony of J. M. Cummings.)

papers made out over at the station and Harper sent them to me through the mail.

Q. Sent them to you at Susitna? A. Yes, sir.

Q. Had he talked to you about it? A. Yes, sir.

Q. Where? A. In Seward.

Q. Before you went in there?

A. Before I went in there.

Q. But you came to no agreement there?

A. We came to no agreement there, he wanted to prospect first—he didn't want to give me the royalty. I wanted to allow prospecting on the ground. [49]

Q. And when did he send you the papers to Susitna? A. I remember it was in June.

Q. Prior to that time there was no lease of the property?

A. Only an understanding that if the ground suited him he could have it at a certain royalty.

Q. And he went up there to tell you—to get the lease? A. Yes, sir.

Q. The lease was made on the terms you agreed on here at Seward? A. Yes, sir.

Q. As a matter of fact, didn't he go to Susitna to talk to Thompson about it? A. I don't know.

Q. Thompson was in there, wasn't he?

A. At the station?

Q. Yes. A. He went back in February.

Q. When he bought back the liquor stock in February, 1910, what did he pay you for it?

A. Four hundred dollars.

Q. In cash? A. Yes, sir.

Q. What kind of money did he pay you?

(Testimony of J. M. Cummings.)

A. He paid me some gold and some currency—I don't remember the exact amount.

Q. Here in Seward? A. Yes, sir.

Q. What would you consider the saloon was worth above its indebtedness?

A. That is the way he sold to me, we agreed upon that price. [50]

Q. There was no accounting made then of the business that had been done during the winter?

A. No, sir.

Q. You just simply stepped out and he stepped in and let the thing go as it looked?

A. Yes, I didn't go over there.

Q. You never had any transfer made to your name —it was still running in the name of Thompson & Price? A. No, I did not.

Q. It was still running in the name of Thompson & Price? A. As far as I know, yes.

Q. When did you go to Susitna—I believe you said you had been there once?

A. I went over there in March, 1911.

Q. You never was there before? A. No.

Q. What income have you received now from that property at Susitna, from those houses—I believe there are three of them—since you bought it?

A. I don't remember exactly.

Q. Have you any account of it?

A. I don't believe I have.

Q. Never kept any account?

A. Never kept any account.

Q. Have you received remittances from time to

(Testimony of J. M. Cummings.)

time? A. Yes, sir.

Q. For rents? A. For rents.

Q. You say you are getting $20 from the saloon?

A. Yes, sir. [51]

Q. During what time have you received that or has it been agreed that you should receive it?

A. Why, I collected back rents when I was over there in March and there has been money sent me different times for rent.

Q. When did this $20 per month rent start?

A. The first of March, 1910.

Q. That was the agreement, as soon as Thompson went in? A. Yes, sir.

Q. And it has been $20 a month from that day to this? A. Up to September.

Q. The first of last September?

A. Yes, it has been ever since but I made arrangements for the rent from September to go on my part of the expense on the building on the rear, the barroom, where it has been built on.

Q. That $20 per month was for the firm or for the half interest? A. For my half interest.

Q. Price owned the other half?

A. Up to the time he sold to Ellixson, I understand.

Q. And Thompson has paid you then from the first of March to the first of September?

A. No, Thompson paid me until May.

Q. And then Ellixson paid you?

A. Then, Ellixson paid me until September.

Q. May, 1911—you mean this last May?

(Testimony of J. M. Cummings.)

A. Yes, May, 1911.

Q. Did Thompson remit to you every month promptly?

A. No, sometimes it would be two months.

Q. How did he send the rent? [52]

A. Generally in currency.

Q. Through the mails? A. Yes, sir.

Q. Never sent a postoffice order? A. No.

Q. Nor a check? A. No.

Q. Did you ever receive a check from him at Susitna? A. I don't remember that I ever did.

Q. You don't know whether he keeps an account here in Seward? A. I do not.

Q. The money he just sent to you by somebody else or just— A. He put it in the mails.

Q. Registered it? A. No.

Q. Just simply without registering?

A. I don't remember his ever registering a letter to me.

Q. Just put the bills in an envelope and sent it— one, two or three months at a time that is $20, $40 or $60? A. Sometimes one or two months.

Q. You don't think he ever registered it?

A. I don't remember that he did.

Q. And he never sent you a money order?

A. Not that I remember of.

Q. Nor a bank check? A. No.

Q. Nor an Alaska Commercial Co. check or draft?

A. I don't think he ever sent me any A. C. Co. draft.

Q. What rental have you received from the other

(Testimony of J. M. Cummings.)

buildings there?

A. The building that they have been using for a boarding-house. In the fall of 1910 Thompson's wife wanted to open a boarding-house [53] in that and the building was in bad shape.

Q. Had it been rented prior to that time?

A. No, not to my knowledge, and I told them any improvements they put on it—they could fix it up to suit themselves and it might be charged on the rent.

Q. And you have not received any rent from that?

A. I have not received any rent from that.

Q. Thompson sold out entirely—he sold out the saloon in May, 1911? A. Yes, sir, his interest.

Q. And at the same time Mrs. Thompson abandoned the roadhouse or gave it up?

A. I think about that time.

Q. Who took it after that, after Mrs. Thompson moved out of it—who took it?

A. A woman named Johnson moved in; Ellixson wrote me about the house; he had to do some repairs on it and he could rent it and I told him to go to work and do any repairing he wanted and use the house.

Q. That was about May?

A. I don't remember just when they went in, the Johnsons.

Q. Has Mrs. Johnson been in it ever since?

A. I think she has.

Q. You don't know? A. I am not sure.

Q. You haven't received any information about it?

(Testimony of J. M. Cummings.)

A. No.

Q. You don't know whether Eri Thompson sold that house to Mrs. Johnson in May, 1911, this road-house—you have never received any information that Thompson sold your house to [54] Mrs. Johnson or purported to sell it to her in July, 1911, and she took possession and purports to be the owner of it now?

A. Ellixson wrote to me there was a chance to sell the house and I wrote to him to sell it.

Q. Have you ever made a deed for it?

A. I signed a contract and option to Mrs. Johnson.

Q. Where was that drawn up?

A. At the station.

Q. By whom, do you know? A. I don't know.

Q. When was that sent to you?

A. I think in September.

Q. Did you sign it here in Seward and send it back? A. Yes, sir.

Q. Was it acknowledged before anybody?

A. Why there was a couple of parties witnessed it.

Q. Who were they, do you remember?

A. It was in the presence of Butts and I think Mr. Butts witnessed it.

Q. William Butts and some other party?

A. I think he witnessed it—I know he was present.

Q. Where did you sign it—where were you when you signed it? A. In Butts' store.

Q. And Mr. Butts and someone else signed it as a witness?

A. There were two witnesses signed it—I am not

(Testimony of J. M. Cummings.)

sure whether Butts was one or not.

Q. You think that was about September?

A. I think it was.

Q. What was that agreement? [55]

A. Why it was, if I remember—I ain't got the copy, I sent the copy to Ellixson and I ain't positive —I think there was $200 to be paid every six months until the property was paid for.

Q. Have you received any information from that, as to what was done about that?

A. No, I have not—I wrote to Ellixson.

Q. You don't know whether she accepted it?

A. Yes, I got $200 sent over to me.

Q. You got the $200 when?

A. It was in September.

Q. How did you get that?

A. Al Harper fetched it over.

Q. In cash? A. No, in an A. C. Co. draft.

Q You say you received 26½ ounces of gold in royalty the first year from the Battle Ax claims on Thunder Creek? A. In 1910.

Q. Yes—the first year you had them—26½ ounces? A. Yes, sir.

Q. That is all you received? A. In 1910.

Q. That was 25% of the yield? A. Yes, sir.

Q. That was worth about $17 at the station?

A. $17.50 over here.

Q. That would be about $450? A. $465.

Q. Now, what did you receive in 1911 in royalties?

A. Fifty-five ounces.

Q. Where was that paid to you? [56]

(Testimony of J. M. Cummings.)

A. Brown & Hawkins turned it over to me.

Q. About what time?

A. It was some time the last of September, if I remember right.

Q. Where was the 26½ ounces paid to you in 1910?

A. In Knik, in Palmer's store.

Q. When they came there?

A. When they came there in October.

Q. You waited there? A. Yes, sir.

Q. When did you come out from Knik?

A. I left Knik on the 28th day of March.

Q. Last year? A. Yes, sir.

Q. And you were in Knik from April, 1910, until March, 1911? A. Yes, sir.

Q. All the income you have ever received from this property, then, is the $20 per month that Thompson and afterwards Ellixson paid you for rent, from the buildings, I mean, at Susitna—

A. Except he sent me $200 that I got from Mrs. Johnson.

Q. What is the total amount you have received for that roadhouse? A. I was to get $800.

Q. Two hundred dollars every six months?

A. If I remember right, that is what the option is —I sent the copy to Ellixson and give him charge of collecting it.

Q. Do you know where Thompson is now?

A. I think he is at the station.

Q. Do you know what he is doing there?

A. I learn he has been sick, the last report from him.

(Testimony of J. M. Cummings.)

Q. He has been out of business since last May as far as you know? A. As far as I know. [57]

Q. Did you ever have any trouble with any of your neighbors up on Thunder Creek over the Battle Ax group? A. No, sir.

Q. Never had any difficulty with Morgan of the Cache Creek, trouble over water?

A. I never had any trouble with him.

Q. Was Thompson authorized to act as your agent on this property at any time? A. No, sir.

Q. He has never had any trouble over that property at all? A. Not from me.

Q. And you have never had any special communication with him about it since you bought him out?

A. Not about the property since I sold my interest in that saloon.

Q. When you sent this deed over from Knik in May, 1910, whom did you give it to, to carry it over?

A. Joe Beede.

Q. Who is Joe Beede?

A. He is a man that used to be up here in 1905 and 6 and Sunrise and on the Inlet.

Q. Where is he now?

A. I heard he was drowned.

Q. Where? A. Over in the Arm.

Q. How long ago?

A. This last summer or fall.

Q. What was Joe Beede doing at Knik at that time?

A. He came from Sunrise in a boat, I remember; some sailboat or Columbia River boat going to the

(Testimony of J. M. Cummings.)

station, I know, had a passenger for Knik and took one or two around the station. [58]

Q. That was the first boat that went from Knik to the station in the spring of 1910?

A. That was the first I knew of any parties going to the station, I remember of.

Q. What did you tell Beede about this deed?

A. I told him I had a deed I wanted recorded and gave him the price and asked him to have it recorded when he got to the station.

Q. How did you know what the price was?

A. I just guessed at it.

Q. And you told him to take it to Farris and have it recorded? A. I told him to have it recorded.

Q. Did you tell him to give it to Thompson?

A. No, I didn't tell him to give it to anybody but have it recorded.

Q. Do you know whether or not he gave it to the recorder?

A. I don't know; I never asked him afterwards.

Q. Did any other boat go from Knik to Susitna about that time that you know of?

A. I don't remember.

Q. What was running from Seldovia at that time?

A. The "Bidarke" and the "Swan" made one trip I went up on before that and Murphy had a boat there.

Q. Did any boat carry mail from Seldovia?

A. Yes.

Q. What boat was that? A. The "Bidarke."

Q. Who was running that?

(Testimony of J. M. Cummings.)

A. I can't think of their names now—Ward and Odea.

Q. Was it a regular mail boat?

A. It was supposed to be but it was not very regular, though. [59]

Q. Did it go through any time that season before the time you gave the deed to Joe Beede?

A. I don't think it did—I don't think the "Bidarke" was there until after that time—I don't remember of it being there until along towards the first of June.

Q. What time did the ice go out of the Knik Arm that year?

A. It was way along toward the first of June.

Q. Weren't the boats running through May from Knik to the station?

A. I think they were, the last of May.

Q. Before the time Joe Beede took the deed over?

A. I never heard of any.

Q. That was the first chance you had to send the deed over after you went to Knik?

A. The first I remember of having.

Q. You had no agreement with Thompson at the time you made this deal with him that you were not to record that for a while?

A. No, sir, nothing said at all.

Q. You are sure of that?

A. I am sure of that.

Q. How many letters did you write to Price during the winter?

A. Only wrote once to him.

(Testimony of J. M. Cummings.)

Q. Why didn't you send the deed at that time to Price?

A. I didn't think there was anything urgent about it.

Q. You didn't think there was anything urgent about recording the deed?

A. I expected to take it over in the spring.

Q. Don't you know that a great many things can happen to a record title in six or seven months?

A. Yes. [60]

Q. When did you first hear there was a judgment against Eri Thompson?

A. It was about the time I went away from here, I think.

Q. The next spring, the spring of 1911?

A. Yes.

Q. You never heard it before? A. No.

Q. Was Thompson ever over at Knik during the time you were there?

A. He was there, I think, in 1911; came in on a launch.

Q. At the time you bought this property you say you paid Thompson $500 in currency?

A. Yes, sir.

Q. How long had you been talking to him about that?

A. A couple of days we had been talking the proposition over.

Q. Did you have any dickering about the price?

A. No, not particular.

Q. How did you happen to pay him this $500—

(Testimony of J. M. Cummings.)

did Thompson say he needed the money?

A. That was the price he agreed upon, $1500 for his interest over there.

Q. How did you arrive at that value, just lumped it off?

A. Just taking Thompson's word about it and from information I had about the business over there.

Q. Where was Mrs. Thompson all this time, do you know?

A. Why, she was on her way outside and I think laid over a couple of weeks at Seldovia waiting for the boat—she came around on the boat and Thompson came over on the trail.

Q. She wasn't at Valdez at this time?

A. No, she went on the boat and went through Valdez. [61]

Q. Did Thompson tell you when he went out that he wasn't coming back?

A. He said he wasn't coming back if he could get into business down there, in a saloon.

Q. Did he ever tell you about the lawsuit he had on with some men?

A. I heard that there was a case coming up at that term of court.

Q. Did you talk to Thompson about that any?

A. Yes, sir.

Q. What did he say to you about it, that he expected the case to be tried? A. Yes, sir.

Q. And were you in Valdez when he went outside?

A. I left just before he went out.

(Testimony of J. M. Cummings.)

Q. And do you know whether or not the case was tried at that term?

A. No, I don't think I ever heard it was tried at that term.

Q. Don't you know as a matter of fact that when Thompson went out in November he went on business and expected to be back and expected that case to be tried, in the spring?

A. I don't know about that,—I talked with him about this case and he told me that there wasn't any chance for any judgment against him, and I talked to his attorney about the case and he told me there wasn't any suit against Thompson.

Q. Now, you say you sold back the liquor stock to Thompson for $400?

A. The license and interest that I bought of him—he was to pay the debts and receive any profits that had been derived from it.

Q. And all that Thompson received from that property up there [62] then was $100, and a thousand dollar note which he owed you?

A. I gave him $500 and his note for a thousand at the time I bought it.

Q. And he gave you $400 back?

A. He gave me $400 back.

Q. So all the money you were out was $100?

A. And the note.

Q. That was all the consideration—you consider that that was sufficient consideration—that was the agreed consideration for a house that rents for practically $40 per month and an association group of

(Testimony of J. M. Cummings.)

eight mining claims?

A. I will tell you from all accounts and Thompson's,—at the time the mining claims were not supposed to be of much value and Thompson told me himself he worked it in 1909 and never made expenses.

Q. How did you happen to have $500 with you at Valdez?

A. For quite a few years I have been in the habit when I went away to have a little money with me and pack it with me—I drew the money out of the bank.

Q. You didn't need $500 for purposes at Valdez when you were drawing $5 a day at Valdez?

A. I didn't know what I might run up against there.

Q. You might go against something and lose quite a lot of money?

A. You never can tell away from home.

Q. Do you know what was in the roadhouse up there at the time you bought it?

A. There was some furniture, not much.

Q. Was there any goods in it, any provisions or supplies? A. Not that I remember of. [63]

Q. What do you consider those houses worth since you have seen them?

A. Well, a log house is something,—if you get a sale for them sometimes you can get a good price and sometimes there ain't much value to it.

Q. It costs considerable to build them up in that country?

(Testimony of J. M. Cummings.)

A. It costs quite a little if you hire the work done.

Q. What does it cost to build a log house the size of that saloon up there?

A. I judge six or seven hundred dollars, it depends on what labor you hire: in some of those towns they hire the Siwashes and get the work done very cheap.

Q. How large a house is it?

A. I am not sure, I think it was about 22 by 28 or 30.

Q. And how large is the roadhouse?

A. It is about 24 by 34, I think.

Q. It is larger than the saloon? A. Yes.

Q. About how much would it cost with the ordinary price of labor in that country to build that roadhouse?

A. If you hired white men it would cost quite a little.

Q. Fix the amount. A. If it is Indian labor—

Q. Fix the amount, $100 or a thousand?

A. I never built any log houses in this country.

Q. Do you think it would cost a thousand dollars to build it? A. No, I do not.

Q. Could you build both houses for a thousand dollars? A. I think a man could; I am not sure.

Q. You say that the rental of your half interest in your saloon building has been $20 per month steadily until the [64] first of last September and you never received anything from the roadhouse?

A. No.

Q. Except the $200?

A. Except the $200 on the option.

(Testimony of J. M. Cummings.)

Q. How much have you paid out for improvements there?

A. I have never paid anything out—whatever was done on the roadhouse went on the use of it—the building that Ellixson put on the rear of the saloon, my part of the expense of that, the rent is to pay for it until it is paid for—he keeps back my part of the rent.

Q. In this case you filed an Answer—is that your signature? (Handing witness paper.)

A. Yes, that is my signature.

Q. Now, if this Answer to the amended complaint of the plaintiff says you received $25 per month from Thompson and his successors up there for the rent of that house, it is a mistake, is it?

A. Yes, sir, $20 is the amount.

Q. And if this Answer says that you paid $1,500 in cash to Thompson on the 25th day of October, that is a mistake too?

A. I told you I paid with a note and $500 in cash.

Q. Let me read to you from your Answer: That on the 25th day of October, 1909 he [meaning you] purchased from defendant Eri Thompson all his right, title and interest in and to all the property mentioned in plaintiff's amended complaint for a valuable consideration of One Thousand Five Hundred Dollars, lawful money of the United States of America, and that on or about the 15th day of February, 1910, this defendant sold and reconveyed to defendant Eri Thompson the undivided one-half interest in and to the stock of goods, etc. [65] What did you mean

(Testimony of J. M. Cummings.)

when you said $1,500 lawful money—did you mean that your note from Thompson was lawful money?

A. Just as good as money, I considered it.

Q. Now, then, that cleared up everything between you and Thompson, did it, that sale—you paid him $500 in cash and gave him his thousand-dollar note back? A. I gave him his note back.

Q. He got his thousand note back? A. Yes, sir.

Q. You say that that note was an outstanding indebtedness of about two years—that it was dated about the last of August, 1907? A. Yes, sir.

Q. This was two years and two months later?

A. Yes, sir.

Q. That note had been due to you all that time?

A. Yes.

Q. And you say Thompson told you he owed seventeen or eighteen hundred dollars on the saloon stock? A. Yes, sir.

Q. This statement in your answer is a mistake, then; it alleges that this defendant alleges and avers that he has no knowledge or information that defendant Eri Thompson was on October 25, 1909, indebted to any person or persons whomsoever or that said defendant Thompson sold this defendant the property mentioned in plaintiff's amended complaint or any of it for the purpose of defrauding, hindering or delaying the plaintiff or any person or persons whomsoever. Then when you swore to this Answer saying you did not know that Thompson was indebted to anybody, you were mistaken, he owed you a thousand dollars? [66]

(Testimony of J. M. Cummings.)

A. I didn't mean on the stock; I didn't think of that at the time.

Q. He owed about half of that? A. Yes, sir.

Q. And owed you a thousand dollars—you say he owed you $1,000?

A. I had his note for a thousand dollars.

Q. You say here, you say in your sworn Answer, you say you did not know he owed anybody on earth; which is correct?

A. When was that—before I paid him his note?

Q. I will read this to you again. I will go back a little bit. I will read the first paragraph: That on or about the 25th day of October, 1909, this defendant purchased from defendant Eri Thompson that certain placer mining claim, etc., and proceeds to describe the mining property and these different houses and then proceeds to say: And paid said Eri Thompson therefor One Thousand Five Hundred Dollars in full for said properties, and that then and there defendant Eri Thompson executed to this defendant a deed therefor and delivered possession thereof to this defendant. Now, over here it repeats that: On the 25th day of October, 1909, he purchased from defendant Eri Thompson all his right, title and interest in and to all the property mentioned in plaintiff's amended complaint for a valuable consideration of Fifteen Hundred Dollars, lawful money of the United States of America. In the next paragraph you say: This defendant alleges and avers that he has no knowledge or information that defendant Eri Thompson was on the 25th day of October, 1909,

(Testimony of J. M. Cummings.)

indebted to any person or persons whomsoever. But you say, now, that he did owe you a thousand dollars and that he owed these other people half of seventeen or eighteen hundred dollars?

A. He owed a half interest of what was due on the stock. [67]

Q. So you knew that he was in fact indebted to you a thousand dollars and nearly a thousand dollars to other people?

A. I had his note for a thousand dollars.

Q. As a matter of fact, when were you at Susitna, how long?

A. I went over there one day and stayed all the next day and started back to Knik the third day.

Q. Did you receive any money while you were over there? A. Yes, sir.

Q. From whom? A. Thompson.

Q. How much did he pay you?

A. I think it was $40 he paid me on that trip.

Q. What was that?

A. He paid me up to the first of April.

Q. Don't you know that it is common talk around this country and around Susitna Station that you took this deed from Eri Thompson for this property as a blind to enable Thompson to defeat this judgment?

A. I never knew of Thompson trying to beat anybody. I have been acquainted with him a good many years and done quite a little business with him and never knew of his beating anybody.

Q. Did Thompson give any reason when he sold you

(Testimony of J. M. Cummings.)

this property for wanting to sell except he was going outside?

A. Nothing, only he wanted to go outside to go into business.

Q. Did he say where he was going?

A. First, he was going to British Columbia, Vancouver and expected to go to the Prince Rupert country—he had a brother on one of those islands.

Q. And he told you positively he didn't expect to come back? [68]

A. If he could get into business down there.

Q. But if he did come back—

A. Then, he thought that he might get into something up here, he didn't know what he would do if he came back.

Q. When did you say the royalty was paid on the first year's lease? A. May.

Q. Where did you say the first lease was made?

A. I think it was in the station—it was sent to me at Knik.

Q. You signed it at Knik?

A. I signed it at Knik.

Q. Where was the second year's lease made?

A. There was only one lease.

Q. It was for two years?

A. That was for three years.

Q. Have you the lease with you or a copy of it?

A. I have not—I think the attorney has.

Q. When you sold back the liquor stock, did any papers pass between you? A. No.

Q. Just a verbal transaction?

(Testimony of J. M. Cummings.)

A. Just a verbal transaction—just a verbal contract.

Q. Now, you say the 55 ounces you got the second year was paid to you here in Seward, at Brown & Hawkins' bank?

A. He went into the bank—Al Harper—and requested Mr. Adams, the cashier, to give him his gold-dust, and he got out the dust and handed me the poke and said, "There is 55 ounces."

Q. Did you weigh it there? A. No, sir.

Q. What did you do with it?

A. Took it to the Bank of Seward and sold it there.

[69]

Q. You never gave Thompson anything of that?

A. No, sir.

Q. You said a while ago that Thompson has no authority to represent you in any way?

A. No, I never gave him any authority.

Q. Did you ever hear that in the summer of 1910, the month of July, when the Harper boys were having trouble with C. P. Morgan because he wanted to take water out of Thunder Creek, that they sent to Susitna Station and got Thompson, and he went up there and spent a week and had quite a row with the Morgans before he would desist taking water out of Thunder Creek?

A. I understood he was on Cache Creek and I never heard of his having trouble with Morgan.

Q. You don't know that he was having trouble there? A. No, sir.

Q. You never knew that he had trouble with Mor-

(Testimony of J. M. Cummings.)

gan and told him not to take water out of the creek?

A. No, sir.

Q. If he did that it was without authority from you? A. Yes, sir.

Q. When was it that you first heard about this sale to Mrs. Johnson?

A. I got a letter that was sent over here from a fellow that is supposed to be in partners with her, named Dennison.

Q. When was that?

A. Al Harper fetched it over—

Q. When he came out? A. Yes.

Q. That was the first you heard of it?

A. No, Ellixson wrote to me some time before that he had a chance to make a sale of the hotel. [70]

Q. What did you write to him?

A. I wrote him, gave him a figure on it—to sell it.

Q. Have you any letters in your possession now from either Ellixson or Thompson?

A. Not on me; no, sir.

Q. Have you any in your possession referring to business? A. I don't remember as I have.

Q. Have you any at your house?

A. I am not sure.

Q. Are you sure you have not?

A. No, sir, I am not—there might be some around the house.

Q. You don't know whether you have that letter from Ellixson referring to the sale of this property?

A. I am not sure of that; I might find it. I generally pack those things around in my pocket; some-

(Testimony of J. M. Cummings.)

times I lose them and sometimes I tear them up.

Q. You said you got that $200 in an Alaska Commercial Co. check? A. A. C. Co. draft.

(Witness excused with instructions to make search for any letters relating to this transaction from Ellixson or Thompson.)

(By Mr. MORFORD.)

Q. With reference to the statement in the complaint that you did not know that Thompson owed anything, was indebted to anybody at the time you purchased—what did you refer to?

A. I meant anybody in Alaska.

Q. You assumed the debts of the concern?

A. I was to assume the debts of the concern.

Q. And transferred your indebtedness to him?

A. Yes, sir. [71]

Q. And that was the only indebtedness there was, that Thompson owed, that you knew of? There was no other indebtedness that Thompson owed that you knew of? A. Not that I know of.

Q. How long have you known Thompson?

A. About sixteen or seventeen years.

Q. Do you know whether there was anybody at Susitna Station to record, any commissioner, there that winter?

A. Farris was out that winter; he was at Valdez during court and went outside and came back, I think, some time in February or March.

Q. And went to the station about what time?

A. It was either February or March, I think,—I

(Testimony of J. M. Cummings.)

don't remember seeing him but I heard he went through.

(By Mr. RITCHIE.)

Q. Didn't you see Farris when he was in town here? A. When he went through?

Q. Yes. A. I am not sure.

Q. Don't you know that he was in town here for a week, in Seward fully a week?

A. When he went back?

Q. Yes, when he went back, in February, 1910?

A. He was back over here—in 1910 or 11, he was here in town for two or three weeks, in the spring.

Q. He went out both winters? A. Yes, sir.

Q. Both 1910 and 1911? A. I think he did.

Q. To refresh your memory I will ask you if you do not remember that Farris went out about the time that Thompson did in [72] November, 1909, as soon as the Williams trial was ended?

A. He was in Valdez when I came away, Farris was.

Q. Do you know or do you not know whether Farris went outside that winter? A. I heard he did.

Q. He came back in February?

A. February or March he came through here—whether I met him or not I don't remember.

Q. If you wanted to get that deed on record as soon as you could, would it not have been a good idea to give it to the recorder as well as Joe Beede?

A. I suppose it would.

Q. It didn't occur to you to give it to Farris when he went through?

(Testimony of J. M. Cummings.)

A. A man like that has lots of stuff to pack over—I didn't think about it at that time.

Q. This deed wasn't very bulky, was it—two or three pages of typewriting—couldn't you give it to him to carry it over there; he was the recorder?

A. I suppose I could have.

Q. Where were you keeping the deed that winter? A. At home.

Q. You never thought of sending it to Susitna for record until you sent it by Joe Beede, a man who is now dead?

A. I sent it from Knik by Joe in 1911.

(By the COURT.)

Q. You say you were over at Valdez before this deed was made out attending court?

A. I was on the grand jury.

Q. How long had you been there? [73]

A. I went over, I think—got there, on the last day of September.

Q. Left there or here?

A. I got over there at Valdez.

Q. You got over to Valdez on the last day of September? A. Yes, sir.

Q. And left and got back early in November, was it? A. Yes, sir.

Q. You say before you went over there you drew $500 out of the bank here?

A. I drew six or seven hundred, as I remember.

Q. Before you went over? A. Yes, sir.

Q. What bank were you banking with here?

A. The Bank of Seward.

(Testimony of J. M. Cummings.)

Q. Will that show in your account with it?

A. I don't know.

Witness excused. [74]

REBUTTAL.

[Testimony of Al Wolf, for Plaintiff (in Rebuttal).]

AL WOLF, called and sworn as a witness in behalf of the plaintiff, in rebuttal, testified as follows:

(By Mr. REED.)

Q. What is your name, occupation and residence?

A. Al Wolf; residence at Seward usually, excepting summer months; occupation, miner.

Q. Do you know Mr. Eri Thompson? A. I do.

Q. You are one of the parties in interest in this action having assigned your claim to Thomas Meredith? A. Yes, sir.

Q. Were you ever on Thunder Creek?

A. I have been.

Q. What year did you first work on Thunder Creek?

A. I believe it was in the year of 1907.

Q. How did you work—for hire? Who did you work for?

A. We went in with Steve Rowe. I was not supposed to go to work, but I went to work for Wallace afterwards. Wallace was supposed to rent the ground that year, but Steve Rowe had charge of it as soon as he arrived there and we went in with Steve Rowe in September.

Q. Without going into the question of the title of the property, tell the Court how much money was

(Testimony of Al Wolf.)

taken out of Thunder Creek property during that year.

(Objected to as immaterial and not rebuttal. Objection overruled and exception allowed.)

A. Well, when we arrived there I was told by the men—

By the COURT.—Tell what you know of your own knowledge.

A. About four thousand dollars, that I know of.

Q. What year?

A. That first year I went in and then Steve Rowe took out a [75] thousand dollars and there was a thousand dollars when I left there that I saw.

Q. Did you work on that property at any time subsequent to that year, 1907?

A. I worked five days for the Harper boys.

Q. Did you see Eri Thompson during the year 1910?

A. Not in the diggings, I don't believe.

Q. Where did you see him, if you saw him?

A. At the station.

Q. Did you see him any other place than the station? A. No, sir.

Q. In the year 1910?

A. In the year 1910 I met him in Seward, in February, before I went in.

Q. Did you have any conversation with Thompson relative to this Thunder Creek property? If so, state what it was—in February, 1910.

(Objected to, etc. Overruled.)

A. I did.

(Testimony of Al Wolf.)

Q. What was that conversation?

A. I spoke to him, trying to get a lay on the ground, as I didn't know for sure whether the Harper boys were coming, and he said he couldn't say a thing until the Harper boys came.

Q. Did you see Thompson after that?

A. I saw him around town, but didn't get to speak to him.

Q. Did you see Thompson and the Harper Brothers together? A. I did.

Q. Where?

A. I saw him going up the street, going into Judge Morford's office, and about an hour afterwards saw him come down the street. [76]

Q. How long was that after the conversation you had with him about the lay on Thunder Creek?

A. I wouldn't exactly mention the days, but it was within ten or fifteen days—that was all the time I was in town.

Q. Were you at the station from October 25, 1909, to February 15, 1910?

A. I was there on two different occasions.

Q. Were you in the saloon commonly known as Thompson & Price's saloon there?

A. I was in there several times.

Q. When was this?

A. In the fall of 1909 and in the winter of 1910.

Q. What time in the fall of 1909?

A. November, part of December, the first two days.

Q. Who was running that saloon?

(Testimony of Al Wolf.)

A. Price—Martin was tending bar. Carl Martin was tending bar.

Q. Did you see Cummings there?

A. I did not.

Q. Were there any signs in that saloon or on that saloon? A. If there was, I didn't notice.

Q. Did you ever see the name of Thompson & Price printed on any part of that saloon?

A. I have on a number of packages that arrived there, and boxes.

Q. Did you see any during the time you speak of?

A. I don't remember as to that—I couldn't say.

Q. Who was running that roadhouse during that winter, if you know?

A. I wouldn't say as to that, as I didn't stop at the roadhouse.

Q. How long were you on this Thunder Creek property in the year 1910?

A. Five or six days or seven days. [77]

Q. Did you see Thompson on the Thunder Creek property in the year 1910? A. No, I did not.

Q. Did you see Thompson during that year, 1910?

A. Only at the station.

Q. What time was that?

A. That was in February, and I believe in the fall.—I am not sure about the fall, though.

Q. Did you have any conversation with Thompson relative to the Thunder Creek property at that time?

A. No, I did not.

(By Mr. MORFORD.)

Q. During the time that you say you had this con-

(Testimony of Al Wolf.)

versation with Thompson about the lay on the Thunder Creek property in the year 1910, February, 1910, was Mr. Cummings in Seward at that time?

A. I couldn't say,—I wasn't acquainted with Cummings and would not have known him if he had been here.

Q. How much money did you actually see on Thunder Creek when you were there?

A. One thousand dollars.

Q. That is all you know of, of your own personal knowledge?

A. That is all I know of, of my own personal knowledge, and what was acknowledged to me by Steve Rowe.

(By Mr. REED.)

Q. Who took that out?

A. Mr. Johnson was foreman at the time.

Q. How many days' cleanup was that, do you know? A. I couldn't say.

Witness excused. [78]

[Testimony of Arthur Meloche, for Plaintiff (in Rebuttal).]

ARTHUR MELOCHE, called and sworn as a witness in behalf of the plaintiff, in rebuttal, testified as follows:

(By Mr. RITCHIE.)

Q. Where do you reside? A. Seward.

Q. What is your business? A. Miner.

Q. How long have you been in Seward?

A. Since the spring of 1906.

(Testimony of Arthur Meloche.)

Q. And where have you been working principally, as a miner?

A. Well, I have worked back here on the peninsula; I have been down on Prince Williams Sound and on Cache Creek and its tributaries, etc.

Q. What years did you work on Cache Creek and its tributaries?

A. I worked on Cache Creek last year and I worked on Thunder Creek in 1909 and 1910.

Q. On whose property did you work on Thunder Creek in 1909 and 1910?

A. I was working with a fellow named George Hersey in 1909.

Q. On whose property?

A. On his own. And I was working for the Harper Brothers on Thunder Creek in 1910.

Q. What was the names of the claims you were working on there? A. That I couldn't say.

Q. It was the property that the Harper Brothers had a lease on? A. Yes, sir.

Q. In 1910, how long did you work there that summer?

A. Well, I think I worked about forty-five days; I ain't positive.

Q. In what months?

A. In July and August.

Q. Who else was working there?

A. Frank Case was up there at the same time.

[79]

Q. And the Harper boys?

A. And the Harper boys.

(Testimony of Arthur Meloche.)

Q. Did you see Cummings up there that summer?

A. No, sir.

Q. Did you see Thompson up there?

A. Yes, sir.

Q. What was he doing?

A. When he came up there—

Q. Do you know what brought him up there?

A. I couldn't say.

Q. (By the COURT.) How far is it from Susitna Station to Thunder Creek?

A. They generally call it about one hundred miles.

Q. Do you know of any trouble with C. P. Morgan or the Cache Creek Company that summer?

A. C. P. Morgan came over while I was at work and I know they had some trouble about the water—to what effect I couldn't say.

Q. What was the trouble about the water?

A. Well, C. P. Morgan and the Cache Creek Company, through him, claims they are entitled to the water of Thunder Creek and the people of Thunder Creek claim they are not.

Q. Did you see Thompson around there about the time of this difficulty with Morgan?

(Objected to as immaterial—overruled—exception.)

Q. Did you see Thompson around there about that time? A. Well, just about that time, I think.

Q. Do you know how he happened to come there?

A. I couldn't say.

Q. (By the COURT.) Do you know that there was any trouble over the [80] water before he

(Testimony of Arthur Meloche.)

came? A. Personally, I do not.

Q. Did you hear anything of the trouble over the water before he came up there? A. Yes, sir.

Q. From whom did you hear it?

A. Just in a general way.

(Objected to—overruled—exception.)

Q. Did you hear anything of it from the Harper boys?

A. Well, I have often heard them talk about the Cache Creek Company trying to take the water away from them.

Q. Do you know whether or not they had any discussion with Morgan about it?

A. I couldn't say as to that.

Q. Do you know whether or not they sent for Thompson to come up? A. No, I do not.

Q. Do you know whether or not Thompson did come up about that time?

A. I know Thompson came up there about that time.

Q. Do you know whether or not he saw Morgan?

A. I don't know positively.

Q. Did you hear him say anything about the property? A. No, sir.

Q. Was he camped near you?

A. He was camped in the same camp—that is he boarded with us, at the same time.

Q. How long did he remain there?

A. A matter of about four or five days.

Q. Did you hear any discussion between him and the Harper boys [81] in regard to the difficulty with Morgan?

(Testimony of Arthur Meloche.)

A. Well, he did say something one day; I don't remember what I was doing at the time. It was at the noon hour, but I don't recollect what he said.

Q. Just tell what was said, if you can remember.

A. I couldn't say what he did say, now.

Q. Did Morgan come over to the camp while Thompson was there? A. No, I don't think so.

Q. Did Thompson go over to see him that you know of?

A. I think I heard him say one day he went over there to see him.

Q. About what? A. About this water affair.

(By Mr. MORFORD.)

Q. You heard him say that he was going over to see him about the water? A. Yes, sir.

Q. That is all you heard him say?

A. That is all I heard him say.

Witness excused.

[Testimony of J. M. Cummings, for Defendants (Recalled).]

CUMMINGS, Recalled.

(By RITCHIE.)

Q. Have you made a search for any letters bearing on this property? A. Yes, sir.

Q. Have you any?

A. I have one from Thompson—I couldn't find any from Ellixson.

Q. Have you that letter with you? A. Yes, sir.

(After being read into the record the letter was stricken.)

Mr. REED.—I want to ask if he has any letters from Ellixson relative to the rent?

A. I have not—I can't find it. [82]

[Certificate of Official Court Stenographer to Bill of Exceptions and Transcript of Evidence.]

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such stenographer I reported the proceedings in the above-entitled cause and that the above transcript is a transcript of the shorthand notes taken by me at the trial of said cause.

J. HAMBURGER.

Dated at Cordova, Alaska, May 23, 1912. [83]

Filed in the District Court, Territory of Alaska, Third Division. Jun. 22, 1912. Ed. M. Lakin, Clerk. By ————, Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Stipulation Touching Transcript of Evidence.

It is hereby stipulated between the parties to this cause that the annexed and foregoing official stenographer's transcript of evidence herein may be certified by the Judge of this court who tried this cause

to be a true and complete transcript of all the evidence adduced or offered on the trial herein, and may thereupon be filed as such by the clerk; and that the clerk of this court, in making up, certifying and transmitting the record on appeal herein, may include said original transcript of evidence in such record on appeal as a part thereof, with the consent of the trial Judge, instead of making a copy thereof as a part of the record on appeal.

J. L. REED,
Plaintiff, *in propria persona.*
S. O. MORFORD and
THOMAS R. SHEPARD,
Attorneys for Defendants.

Certificate [to Bill of Exceptions].

The undersigned, the Judge of the above-named court who presided at the trial of the above-entitled cause, hereby certifies, in pursuance of the foregoing stipulation of the parties and in accordance with the facts, that the annexed and foregoing bill of exceptions and transcript of evidence is a true and complete transcript of all the evidence adduced or offered at said trial and of all proceedings thereat.

Witness the hand of said Judge and the seal of said court, at Valdez, Alaska, this 22d day of June, 1912.

[Seal] EDWARD E. CUSHMAN,
District Judge. [84]

[Plaintiff's Exhibit "A."]

In the District Court for the Territory of Alaska, Third Division, at Valdez.

No. 233.

THOMAS H. MEREDITH,

Plaintiff,

vs.

DAVE WALLACE and ERI THOMPSON, Co-partners as WALLACE and THOMPSON,

Defendants.

Judgment.

This cause coming on regularly for trial on the 5th day of April, 1910, E. E. Ritchie and J. L. Reed, appearing as counsel for plaintiff, and S. O. Morford, Esq., for the defendant Eri Thompson. A trial by jury having been waived by the parties, the cause was tried by the Court without a jury, whereupon witnesses on the part of the plaintiff and defendant were duly sworn and examined and the affidavit of S. O. Morford, Esq., as to what the defendant Eri Thompson would testify if present, and documentary evidence introduced by plaintiff and the evidence being closed, the cause was submitted to the Court for consideration and decision; and, after deliberation thereon, the Court files its findings of fact and conclusions of law in writing, and orders that judgment be entered herein in favor of plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that

Thomas H. Meredith, the plaintiff, do have and recover, of and from the defendants Dave Wallace and Eri Thompson, copartners, jointly and severally, the sum of One Thousand Five Hundred and Ninety-eight Dollars and Eighty Cents ($1,598.80), with interest thereon at the rate of eight per cent per annum from the date hereof until paid, together with the plaintiff's costs and disbursements incurred in the action, amounting to the sum of $32.65.

Dated this 25th day of April, A. D. 1910.

PETER D. OVERFIELD,
District Judge. [85]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. April 25, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 5, Page No. 824.

Plaintiff's Exhibit "A," Cause No. S. 9. [86]

In the District Court for the Territory of Alaska, Third Division.

No. 233.

THOMAS H. MEREDITH,
Plaintiff,

vs.

DAVE WALLACE and ERI THOMPSON,
Defendants.

Alias Execution.

The President of the United States of America, to the Marshal of said Division and Territory, Greeting:

Whereas, Thomas H. Meredith recovered judgment

against Eri Thompson in the District Court for said Division and Territory, holding terms as aforesaid, on the 25th day of April, 1910, for the sum of Fifteen Hundred and Ninety-eight and 60/100 Dollars, with interest thereon at the rate of eight per cent until paid, and costs of suit, amounting to Thirty-two and 65/100 Dollars;

And whereas an execution was duly issued out of this court on the 1st day of July, 1910, and was returned in due course by the United States Marshal of said division on the 26th day of August, 1910, wholly unsatisfied;

THEREFORE, in the name of the United States of America, you are hereby commanded to levy upon, seize and take into execution the personal property of the said Eri Thompson, in your Division of said District, sufficient, subject to execution, to satisfy said judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law; and if sufficient personal property cannot be found, then you are further commanded to make the amount of said judgment, interest and increased interest, costs and increased costs, out of his real property not exempt by law, and make return of this writ within sixty days from the date hereof.

Herein fail not, and have you then and there this writ.

Witness the Honorable EDWARD E. CUSHMAN, Judge of said Court, and the seal of said Court hereto affixed this 2d ———, A. D. 1910.

[Seal] ED. M. LAKIN,
Clerk.
By Thos. S. Scott,
Deputy. [87]

Marshal's Return.

United States of America,
District of Alaska,
Third Division,—ss.

I hereby certify that I received the within Execution on the 2d day of September, 1910. at Valdez, Alaska, and after due and diligent search was unable to find any property, either real or personal, belonging to within-named defendant, Eri Thompson, upon which levy could be made, within the District.

Returned this 6th day of September, A. D. 1910.

H. P. SULLIVAN,
U. S. Marshal.
By J. H. D. Bouse.
Chief Office Deputy.

[Endorsed]: Plaintiff's Exhibit "A." Filed in the District Court, Territory of Alaska, Third Division. Sep. 6, 1910. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [88]

In the District Court for the Territory of Alaska, Third Division.

No. 233.

THOMAS H. MEREDITH,

Plaintiff,

vs.

DAVE WALLACE and ERI THOMPSON,

Defendants.

Execution.

The President of the United States of America, to the Marshal of said Division and Territory, Greeting:

WHEREAS, Thomas H. Meredith recovered judgment against Eri Thompson in the District Court for said Division and Territory, holding terms as aforesaid, on the 25th day of April, 1910, for the sum of *Fourteen Hundred and 60/100* (1498.60) Dollars, with interest thereon at the rate of 8 per cent until paid, and costs of suit, amounting to Thirty-two and 65/100 Dollars ($32.65);

THEREFORE, in the name of the United States of America, you are hereby commanded to levy upon, seize and take into execution the personal property of the said Eri Thompson, in your Division of said District, sufficient, subject to execution, to satisfy said judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law; and if sufficient personal property cannot be found, then you are further commanded to make the amount of said judgment, interest and increased in-

terest, costs and increased costs, out of any real property not exempt by law, and make return of this writ within sixty days from the date hereof.

Herein fail not, and have you then and there this writ.

Witness the Honorable EDWARD E. CUSHMAN, Judge of said Court, and the seal of said Court hereto affixed this 1st day of July, A. D. 1910.

[Seal] ED. M. LAKIN,
Clerk.
By Thos. S. Scott,
Deputy. [89]

Marshal's Return.

United States of America,
Territory of Alaska,
Third Division,—ss.

I hereby certify and return that I received the annexed Writ of Execution on the 1st day of July, 1910, and thereafter on the same date I served the same at Valdez, Alaska, upon Ed. M. Lakin, Clerk of the United States District Court for the Third Judicial Division, District of Alaska, by delivering to and leaving with Thos. S. Scott, Deputy Clerk for said Court, a copy of this writ certified to be such by the United States Marshal for said Third Division, District of Alaska, together with a notice of garnishment in answer to which he made the following statement:

"Valdez, Alaska, July 1, 1910.

To H. P. Sullivan, Esq.,
United States Marshal,
Valdez, Alaska.

In answer of the notice of garnishment and copy

of execution served upon me in the case of Thomas H. Meredith vs. Dave Wallace and Eri Thompson, I have to make the following report:

That I, as a private individual, have not in my possession, or under my control, any goods, credits, effects, licenses, rights, privileges or other personal property, of any kind or character whatever, belonging or payable to Eri Thompson.

That there is now deposited with me, as Clerk of the District Court for the Third Division of the District of Alaska, the sum of five hundred dollars, which was deposited by Eri Thompson and Hugh Price in payment for a liquor license, the application for which is now pending before said court, which said sum of money is held by me as such Clerk subject to the order of the above-entitled court; that said money is in the custody of the law and not subject to execution.

ED. M. LAKIN,
Clerk District Court for Territory of Alaska, Third Division.
By Thos. S. Scott,
Deputy."

Dated at Valdez, Alaska, this 26th day of August, 1910.

H. P. SULLIVAN,
U. S. Marshal.
By J. H. D. Bouse,
Chief Office Deputy.

Marshal's costs: 1 Service, 6.00.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 26, 1910. Ed.

M. Lakin, Clerk. By Thos. S. Scott, Deputy. Plaintiff's Exhibit "A." Cause S–9. [90]

[Plaintiff's Exhibit "B."]

QUITCLAIM DEED.

This Indenture, Made this 25th day of October, in the year of our Lord one thousand nine hundred and nine, BETWEEN Eri Thomspon of Susitna, Alaska, the party of the first part, and J. M. Cummings, of Valdez, Alaska, the party of the second part:

WITNESSETH, that the said party of the first part, for and in consideration of the sum of One ($1.00) Dollar, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns the following described property situate, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain Placer Mining Claim known as the Battle Axe located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Price's saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.

That certain log house adjacent to John Jones' bath-house, and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party and also that certain log cabin situated in the rear of said log house with all chattels or other property therein contained.

To Have and to Hold, all and singular the said premises, together with the appurtenances unto the said party of the second part, and to his heirs and assigns forever. [91]

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ERI THOMPSON. [Seal]

Signed, sealed and delivered in the presence of

H. S. FARRIS.

WILLARD Y. SCOTT.

United States of America,
Territory of Alaska,—ss.

THIS IS TO CERTIFY, that on this 25th day of October, A. D. 1909, before me, H. S. Farris, a Notary Public, in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Eri Thompson, to me known to be the individual described in and who executed the within instrument, and who acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal the day and year in this certificate first above written.

[Seal. N. P.] H. S. FARRIS,

Notary Public, in and for Alaska, Residing at Susitna, Alaska.

Filed May 22, 1910, at 8:30 P. M., request of Eri Thompson.

H. S. FARRIS,

District Recorder. [92]

Territory of Alaska,

Cook Inlet Precinct,—ss.

I, the undersigned, a United States Commissioner and ex officio Recorder for Cook Inlet Precinct, Territory of Alaska, hereby certify that the foregoing is a full, true and correct copy of a deed as the same appears on page 424 of Volume 1, records of deeds in my office and in my custody, and of the whole thereof.

Witness my hand and seal this 29th day of July, A. D. 1910.

[Seal] H. S. FARRIS,

United States Commissioner and ex officio Recorder for Cook Inlet Precinct, residing at Susitna, Alaska. [93]

[Plaintiff's Exhibit "C."]

United States of America,

Territory of Alaska,—ss.

I, the undersigned clerk of the District Court of the Territory of Alaska, Third Division, do hereby certify that the following is a full, true and correct

copy of the original entry in the judgment docket, Volume 1 of the District Court, Territory of Alaska, Third Division, as the same appears on Page 260, at line 7, the same being of record in my office.

Judgment Debtor—Thompson Eri and Wallace Dave.

Judgment Creditor—Meredith Thos. H.

Case No.—233.

Amt. of judgment Principal, $1,598.80.
Interest, 8% from date until paid.
Costs, $32.65.

Date of entry in Journal—April 25, 1910. Volume 5, page 824.

When docketed—April 29, 1910.

In testimony whereof, I have subscribed my name and affixed the seal of the said court at Valdez, Alaska, this 29th day of April, 1910.

[Seal] ED. M. LAKIN,
Clerk.
By Thos. S. Scott,
Deputy.

District of Alaska,
Cook Inlet Precinct and Recording District,—ss.

The within instrument was filed for record at 11:10 o'clock P. M. May 22, 1910, and duly recorded on book 111, Orders and Judgments, on page 1 of the records of said district.

[Seal] H. S. FARRIS,
District Recorder. [94]

[Plaintiff's Exhibit "D."]

1910	DECEMBER					1910
Sun.	Mon.	Tue.	Wed.	Thu.	Fri.	Sat.
*	*	*	*	1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Plff. Ex. D. S. 9.

CALENDAR.

1910.

	Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
JAN.	..	..	..	..	..	..	1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31	..	..	..	..	..
FEB.	..	..	1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	..	..	..	..	..
MAR.	..	..	1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30	31	..	..
APRIL.	..	..	..	..	..	1	2
	3	4	5	6	7	8	9
	10	11	12	13	14	15	16
	17	18	19	20	21	22	23
	24	25	26	27	28	29	30
MAY.	..	..	..	..	..	..	..
	1	2	3	4	5	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26	27	28
	29	30	31	..	..	..	..
JUNE.	..	..	..	1	2	3	4
	5	6	7	8	9	10	11
	12	13	14	15	16	17	18
	19	20	21	22	23	24	25
	26	27	28	29	30	..	..

	Sun.	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.
JULY.	..	..	..	..	..	1	2
	3	4	5	6	7	8	9
	10	11	12	13	14	15	16
	17	18	19	20	21	22	23
	24	25	26	27	28	29	30
	31	..	..	..	..	..	..
AUG.	..	1	2	3	4	5	6
	7	8	9	10	11	12	13
	14	15	16	17	18	19	20
	21	22	23	24	25	26	27
	28	29	30	31	..	..	..
SEPT.	..	..	..	..	1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	..
OCT.	..	..	..	..	..	..	1
	2	3	4	5	6	7	8
	9	10	11	12	13	14	15
	16	17	18	19	20	21	22
	23	24	25	26	27	28	29
	30	31	..	..	..	..	..
NOV.	..	..	1	2	3	4	5
	6	7	8	9	10	11	12
	13	14	15	16	17	18	19
	20	21	22	23	24	25	26
	27	28	29	30	..	..	..
DEC.	..	..	..	..	1	2	3
	4	5	6	7	8	9	10
	11	12	13	14	15	16	17
	18	19	20	21	22	23	24
	25	26	27	28	29	30	31

[Plaintiff's Exhibit "E."]

This Mortgage, made the 14th day of July in the year A. D. Nineteen Hundred and Ten by Eri Thompson of Susitna, Cook Inlet Precinct, Territory of Alaska, by occupation a Retail Liquor Dealer, Mortgagor, to W. Murphy, also of said Susitna by occupation River Boatman, Mortgagee:

Witnesseth, That said Mortgagor mortgages to the said mortgagee all that certain personal property situated and described as follows, to wit:

An undivided one-half interest in and to all that certain stock of liquors and cigars now owned by Eri Thompson and Hugh Price; either in the saloon conducted by said Thompson and Price, or in transit from Seattle or other cities to Susitna. The above mentioned stock of liquors & cigars are mortgaged as security for the payment to W. Murphy the said mortgagee of the sum of Eleven Hundred ($1100.00), with interest thereon at the rate of —— per cent per ——— according to the terms and conditions of a certain promissory note, as follows:

Number.	Maker.	Date.	Due.	Amount.
One	Eri Thompson	July 14, 1910	July 14, 1911	$1100.00

It is also agreed that if the mortgagor shall fail to make any payment, as in the said promissory note provided then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note specified, together with such reasonable attorneys fees as may be allowed by

the Court and all costs and expenses.

In Testimony Whereof, I, the Mortgagor herein named, have hereunto set my hand and seal the day and date first above written.

ERI THOMPSON. [Seal.]

Signed, sealed and delivered in the presence of

_____.

_____.

United States of America,
Territory of Alaska,—ss.

Eri Thompson the Mortgagor in the foregoing mortgage named, being first duly sworn, on oath deposes and says that the sforesaid mortgage is made in good faith, and without any design to hinder, delay or defraud creditors.

ERI THOMPSON.

Subscribed and sworn to before me, this 14th day of July, A. D. 1910.

[Seal N. P.] H. S. FARRIS,
Notary Public in and for the Territory of Alaska, Residing at Susitna.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this 14th day of July, A. D. 1910 before me, H. S. Farris, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came Eri Thompson to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal N. P.] H. S. FARRIS,

Notary Public in and for the Ty. of Alaska, Residing at Susitna.

Filed July 15, 1910, at 11:30 A. M. Request of Eri Thompson.

H. S. FARRIS,
District Recorder.

United States of America,
Cook Inlet Precinct,
Territory of Alaska,—ss.

I, H. S. Farris, U. S. Commissioner and ex-officio Recorder for the Precinct and Territory aforesaid, hereby certify that the above and foregoing is a full, true and correct copy of a mortgage from Eri Thompson to W. Murphy, as the same appears at page 10, Vol. 1, record of mortgages for said precinct.

Witness my hand and official seal this 5th day of July, A. D. 1911.

[Seal] H. S. FARRIS,

U. S. Commissioner and ex-officio Recorder for Cook Inlet Precinct, Residing at Susitna. [96]

[Plaintiff's Exhibit "F."]

In the District Court for the Territory of Alaska, Third Division, at Valdez.

No. 233.

THOMAS H. MEREDITH,

Plaintiff,

vs.

DAVE WALLACE and ERI THOMPSON, Co-partners as WALLACE & THOMPSON,

Defendants.

It appearing to the satisfaction of the Court by the proof on file herein that personal service of the summons together with a copy of the complaint certified to be plaintiff's attorney was made on the defendant Eri Thompson personally and that upon the issues joined by the pleadings herein, and this cause coming on regularly for trial on the 5th day of April, A. D., 1910, and E. E. Ritchie and J. L. Reed, appearing as counsel for the plaintiff and S. O. Morford, Esq., appearing for the defendant Eri Thompson, and trial by jury having been waived by the parties, the case was tried before the Court without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined and the affidavit of S. O. Morford, Esq., as to what the defendant Eri Thompson would testify if present, and documentary evidence introduced by plaintiff and the evidence being closed and the Court being fully ad-

vised in the premises, now makes the following findings of fact and conclusions of law herein:

FINDINGS OF FACT.

I.

That during the times set forth in plaintiff's complaint, and on, prior to and between the 9th day of June, 1907, and the 21st day of September, 1907, the Defendants Dave Wallace and Eri Thompson were *em*gaged in and doing business as a general co-partnership, and [97] as such did work upon and develop certain placer mining ground known as the Battle Axe Group of placer mining claims situated in Thunder Creek in Cook's Inlet Mining and Recording District, in the Third Division of the Territory of Alaska.

II.

That under a contract of employment with said copartnership the plaintiff did work and performed services as a placer miner on the said Battle Axe Group of mining claims at an agreed compensation of $5.00 per day and board from the 7th day of September, 1907, to and including the 21st day of September, 1907, or a period of fifteen days, and that the sum earned by plaintiff amounts to Seventy-five dollars, and that the defendants have failed, neglected and refused to pay the same.

III.

That under a contract of employment with said copartnership Alex. McKenzie did work and performed services as a placer miner on the said Battle Axe Group of mining claims at an agreed compensation of $5.00 per day and board from the 13th day of June,

1907, to and including the 20th day of September, 1907, for a period of eighty days, and that the sum earned by the said Alex. McKenzie amounts to Four hundred dollars of which no part has been paid except the sum of Twelve dollars, leaving a balance due and unpaid of the sum of Three hundred and eighty-eight dollars which sum the defendants have failed, neglected and refused to pay.

IV.

That on the 1st day of November, 1907, Alex. McKenzie for a valuable consideration assigned, set over and transferred said claim of $386.00 to the plaintiff herein.

V.

That under a contract of employment with said copartnership Andrew Beck did work and performed services as a placer miner on the said Battle Axe Group of mining claims at an agreed compensation [98] of $5.00 per day and board from the 13th day of June, 1907, to and including the 20th day of September, 1907, or a period of eighty-eight days, and that the sum earned by the said Andrew Beck amounts to Four hundred and forty dollars of which no part was paid except the sum of $25.00, leaving a balance due and unpaid of the sum of Four hundred and fifteen dollars, which sum the defendants have failed, neglected and refused to pay.

VI.

That on the 1st day of November, 1907, Andrew Beck for a valuable consideration assigned, set over and transferred said claim of $415.00 to the plaintiff herein.

VII.

That under a contract of employment with said co-partnership Frank Johnson did work and performed services as a placer miner on the said Battle Axe Group of mining claims at an agreed compensation of $5.00 per day and board on and between the 9th day of June, 1907, and the 11th day of July, 1907, or a period of twenty-nine days, and that the sum earned by the said Frank Johnson amounts to One hundred and forty-five Dollars; that under a contract of employment with said co-partnership Frank Johnson did work and performed services as a placer miner and foreman on the said Battle Axe Group of mining claims at an agreed compensation of $6.00 per day and board from the 12th day of July, 1907, to and including the 6th day of September, 1907, or a period of forty-one days, and that the sum earned by the said Frank Johnson amounts to Two hundred and forty six dollars or a total sum of Three hundred and ninety one dollars of which no part has been paid except the sum of Twenty five dollars which sum defendants have failed, neglected and refused to pay.

VIII.

That on the 1st day of November, 1907, Frank Johnson for a valuable consideration assigned, set over and transferred said claim of $366.00 to the plaintiff herein. [99]

IX.

That under a contract of employment with said co-partnership Al. A. Wolf did work and performed services as a placer miner on the said Battle Axe

Group of mining claims at an agreed compensation of $5.00 per day and board from the 9th day of September, 1907. to and including the 19th day of September, 1907, or a period of nine and one-half days, and that the sum earned by the said Al. A. Wolf amounts to Forty seven and one-half dollars of which no part has been paid which sum the defendants have failed, neglected and refused to pay.

X.

That on the 30th day of September, 1907, Al. A. Wolf for a valuable consideration assigned, set-over and transferred said claim of $47.50 to the plaintiff herein.

And the Court finds the following conclusions of law:

I.

That during the times set forth in plaintiff's complaint and on, prior to and between the 9th day of June, 1907, and the 21st day of September, 1907, the defendants Dave Wallace and Eri Thompson were engaged in and doing business as a mining partnership, in mining on the Battle Axe Group Mining claims, as mentioned in the complaint.

II.

That on the seventh day of September, 1907, a contract of employment was entered into between the plaintiff and the defendant co-partnership whereby the defendants became indebted to the plaintiff in the sum of Seventy five dollars.

III.

That on the 13th day of June, 1907, a contract of employment was entered into between Alex. Mc-

Kenzie and the defendant co-partnership whereby the defendants became indebted to the said Alex McKenzie in the sum of Three hundred and eighty-eight dollars. [100]

IV.

That on the 1st day of November, 1907, the said Alex McKenzie for a valuable consideration assigned, set-over and transferred to the plaintiff said claim of $388.00.

V.

That on the 13th day of June, 1907, a contract of employment was entered into between Andrew Beck and the defendant co-partnership whereby the defendants became indebted to the said Andrew Beck in the sum of Four hundred and fifteen dollars.

VI.

That on the 1st day of November, 1907, the said Andrew Beck for a valuable consideration assigned, set-over and transferred to the plaintiff said claim of $415.00.

VII.

That on the 9th day of June, 1907, a contract of employment was entered into between Frank Johnson and the defendant co-partnership whereby the defendants became indebted to the said Frank Johnson in the sum of Three hundred and sixty six dollars.

VIII.

That on the 1st day of November, 1907, the said Frank Johnson for a valuable consideration assigned, set-over and transferred to the plaintiff said claim of $366.00.

IX.

That on the 9th day of September, 1907, a contract of employment was entered into between Al. A. Wolf and the defendant co-partnership whereby the defendants became indebted to the said Al. A. Wolf in the sum of Forty seven and one-half dollars.

X.

That on the 30th day of September, 1907, the said Al. A. Wolf for a valuable consideration assigned, set-over and transferred to the plaintiff said claim of $47.50. [101]

XI.

That the plaintiff is entitled to recover from the defendants upon each of the above amounts or a total sum of one thousand three hundred [illegible] of eight dollars and fifty cents ($1,32[illegible]) with interest thereon at the rate of 8 per centum per annum from the 21st day of September, 1907.

Dated this 25th day of April, 1910.

PETER D. OVERFIELD,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 25, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. Entered Court Journal No. 5, page No. 821. Plaintiff's Exhibit "F," Cause S. 9. [102]

[Defendants' Exhibit No. 1.]

QUITCLAIM DEED.

This Indenture, Made this 25th day of October, in the year of our Lord one thousand nine hundred and nine, Between Eri Thompson, of Susitna, Alaska,

the party of the first part, and J. M. Cummings, of Valdez, Alaska, the party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of ONE ($1.00) DOLLAR, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents remise release and forever quit-claim unto the said party of the second part and to his heirs and assigns the following described property, situate, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

[illegible] Placer Mining Claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Prices' saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.

That certain log house adjacent to John Jones' bath-house, and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party; and also that certain log cabin situated in the rear of said log house, with all chattels or other property therein contained."

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances unto the said party *og* the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

ERI THOMPSON. [Seal]

Signed, sealed and delivered in the presence of,

H. S. FARRIS.

WILLARD Y. SCOTT.

United States of America,
Territory of Alaska,—ss.

This is to certify, that on the 25th day of October, A. D. 1909, before me, H. S. Farris, a Notary Public, in and for the Territory of Alaska, duly commissioned and sworn, personally appeared Eri Thompson, to me known to be the individual described in and who executed the within instrument, and who acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] H. S. FARRIS,
Notary Public, in and for Alaska, Residing at Susitna, Alaska.

District of Alaska,
Cook Inlet Precinct, and Recording District,—ss.

The within instrument was filed for record at 8:30 o'clock P. M. May 22, 1910, and duly recorded on

book 11 Deeds on page 424 of the records of said district.

[Seal] H. S. FARRIS,
District Recorder. [103]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS, Co-partners,

Defendants.

Motion for Order Requiring J. L. Reed, as the Real Party in Interest, to be Substituted in Place of Plaintiff.

Now comes J. M. Cummings, one of the defendants in this action, and moves the Court for an order requiring J. L. Reed to be substituted as the plaintiff in this action in the place of Thomas H. Meredith, the plaintiff of record herein, upon the ground that said J. L. Reed has become and now is, by force of an assignment, dated January 12, 1912, of the judgment mentioned in the amended complaint herein and which judgment this action is brought to enforce against property of this defendant Cummings, the owner of said judgment, and is therefore the real and sole party in interest in the prosecution of this action.

This motion is based on said assignment, of

record in this court in cause No. 233, on a notice of said assignment served on February 23, 1912, and a copy whereof is hereto attached, and on all the files, records and proceedings in this action.

Dated March 14, 1912.

S. O. MORFORD, and
THOMAS R. SHEPARD,
Attorneys for Defendant Cummings.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Mar. 16, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. **[104]**

In the District Court for the Territory of Alaska, Third Division.

No. 233.

THOMAS H. MEREDITH,

Plaintiff,

vs.

DAVE WALLACE and ERI THOMPSON, Copartners,

Defendants.

Notice of Assignment of Judgment.

To Eri Thompson, Defendant, and S. O. Morford, His Attorney:

You are hereby notified that the judgment recovered in this action by the plaintiff, Thomas H. Meredith, against the defendant, Eri Thompson, was duly assigned to J. L. Reed, by an assignment in writing dated January 12, 1912, which said assignment has this day been filed in the office of the

clerk of the above-named court, as a part of the files and court record of the above-entitled and numbered cause.

Dated at Seward, Alaska, this 23d day of February, 1912.

J. L. REED and
E. E. RITCHIE,
Attorneys for Plaintiff.
J. L. REED,
Assignee.

Service of a copy of the foregoing notice acknowledged this 23d day of February, 1912.

S. O. MORFORD,
Attorney for Defendant, Eri Thompson. [105]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS, Copartners,

Defendants.

Order Substituting J. L. Reed in Place of the Plaintiff.

The motion of the defendant J. M. Cummings, in this action for an order requiring J. L. Reed to be substituted as the plaintiff herein in the place of Thomas H. Meredith having come on to be heard before this court on the 23d day of March, 1912,

and having been argued by counsel for the plaintiff and the defendant Cummings respectively, and it appearing to the Court from the files and records herein that said J. L. Reed, by force of an assignment by said Meredith to him, dated Jany. 12, 1912, of the judgment mentioned in the amended complaint herein and which this action is brought to enforce against the defendant Cummings, is the owner of said judgment and is therefore the real party in interest in the prosecution of this action—and the Court being fully advised in the premises;

It is ordered, by the Court now here, that said J. L. Reed be and he hereby is substituted and do henceforth stand as the plaintiff in this action, in the place of Thomas H. Meredith, and that the title of this action henceforth do stand amended accordingly.

Let this order be entered and filed *nunc pro tunc* as of the 23d day of March, 1912.

Dated April 6, 1912.

EDWARD E. CUSHMAN,
District Judge.

Entered Court Journal No. 6, page No. 696.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 6, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [106]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

THOMAS H. MEREDITH,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Decision.

This is a cause tried to the Court without a jury, brought to set aside a deed alleged to be made by the defendant Thompson to the defendant Cummings in fraud of the former's creditors, to subject the property therein named to the lien of a judgment obtained by the plaintiff Meredith against Thompson and another, for an injunction and general equitable relief.

The complaint states that the plaintiff obtained in April, 1910, such judgment in this Court for $1,598.60; that an execution and *alias* execution have been issued thereon but both returned unsatisfied and no property found; that on May 22, 1910, a deed from Thompson to Cummings of certain real and chattel property was filed with the recorder of Cook's Inlet Precinct, the property being described as a placer mining claim called the Battle Ax, certain log buildings and the lot of ground on which one stood and a one-half interest in a saloon; that the deed was not made in good faith or for a valid consideration but was the result of a conspiracy be-

tween defendants and made with the intention of placing Thompson's property beyond the reach of his creditors and to hinder, delay and defraud the plaintiff in the collection of his judgment. That the defendant Cummings never took possession of the property, but that the same has remained at all times since in the custody and control of the defendant Thompson. That plaintiff's judgment was obtained against defendant Thompson and one Dave [107] Wallace, as copartners; that Wallace left the territory in 1907 to defraud plaintiff in the collection of his claim; that he has not returned, has no property in the territory and is insolvent; that in 1910 Thompson mortgaged certain of the personal property to one Murphy; that the mortgage and deed were made for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment; that by them all of Thompson's property, real and personal, was transferred; that defendant Thompson is insolvent and neither Thompson nor Wallace has property, real or personal, individual or partnership, other than that conveyed by the deed.

Defendants have answered separately. The answer of the defendant Cummings admits the judgment, the issuance and return of executions; alleges the purchase by him from the defendant Thompson of the property in dispute; that in February, 1910, he sold back to Thompson the saloon stock and rented to him the saloon buildings; denies that any other of the property has ever since the sale been in Thompson's possession; denies all fraud in the sale and alleges its purchase by him for $1,500.

The answer of the defendant Thompson is substantially the same as that of Cummings, alleging his (Thompson's) possession of the saloon stock from February, 1910, to May, 1911; that the mortgaging of it by him was in good faith and that the mortgage has been paid.

The affirmative matter of the answer is put in issue by the reply.

The evidence establishes the following facts: In December, 1907, the plaintiff began an action in court against the defendant Thompson and Dave Wallace to recover $1,328.50; that the latter left the territory about that time and has not returned. There is no evidence that he had or left property in the territory of any kind. Cummings testifies that he and Thompson were partners in 1903 and 1904; that they had known each other for seventeen or eighteen years; that in August, 1907, he (Cummings) sold Thompson a one-half interest in a [108] saloon at Katalla for $2,000, one-half cash; that he took Thompson's note for the other thousand dollars, due in one year, without interest. It is shown that in 1909 Cummings was residing at Seward, Alaska, and Thompson at Susitna Station, Alaska, where the property involved in this suit, other than the mining claim, is situated. The mining claim is some one hundred miles from Susitna Station, which latter place is over one hundred miles from Seward. That in October, 1909, Cummings had never seen any of this property; that in that month both defendants were at Valdez, Alaska, where court was then in session, some 250 miles from Susitna

Station, Cummings as a member of the grand jury and Thompson awaiting an expected trial of the suit brought by plaintiff against him and Wallace. Both defendants testified that at this time—October, 1909—Thompson executed to Cummings the deed attacked in the present suit; that Cummings knew of the then pending suit against Thompson; that he understood at the time that Thompson intended to permanently leave Alaska; that he was going into British Columbia, where he would attempt to secure some business and remain. It is shown that the deed included all the property then owned by Thompson in this territory. Defendants testify that the consideration for the deed was the surrender of Thompson's note for $1,000 and $500 in cash. The note was then over a year past due; Cummings had never asked for its payment; there was no check or other documentary evidence of the $500 cash payment or that Cummings had withdrawn from his bank account prior to that date such or a greater amount.

The evidence of the value of the property conveyed is not satisfactory; that the property other than the mining claim was probably worth about $1,500; the mining claim had a purely speculative value impossible to fix.

The deed was drawn and acknowledged before Mr. Farris, then commissioner and recorder at Susitna Station. Mr. Farris does not remember that the deed was delivered to Cummings at the time of its [109] execution. Cummings returned to Seward, leaving Thompson at Valdez. Afterwards Thomp-

son went outside, either to British Columbia or the states. Cummings remained at Seward during the winter of 1909–10; he did not take possession of any of the property nor visit it, altho he says he heard bad reports about the way the saloon business was being run and that his idea in buying was to get into business. This saloon was then being conducted by Thompson's former partner Price. Cummings did not know Price, never had any accounting with him; says he wrote him once that he would go into Susitna Station in the spring. The saloon was being run under the old name of Thompson & Price and under the license to them.

Thompson returned to Susitna Station by way of Seward in February, 1910. Defendants testify that while at Seward on his return he bought back from Cummings the one-half interest in the saloon business for $400 cash and rented the saloon building for $20 per month. No documentary evidence of this transaction is produced.

It has been claimed that the rent has been paid since to September, 1911, by Thompson and his successor in the saloon to Cummings; there is no documentary evidence of any of these payments. Defendants claim that the money was remitted from Susitna to Seward in cash, generally by letter but never registered and never by check or postoffice order.

Thompson returned to Susitna in February, 1910, where he is still sustaining the same apparent relations to the property there as before. Cummings in April, 1910, went to Knik, which is about thirty-

five miles from Susitna. At Knik he got employment tending bar and his wife running a roadhouse for his employer; he did not visit Susitna until 1911, when he was there for one day; he has never visited the mining claim.

April 25, 1910, plaintiff recovered judgment for $1,598.60 in his suit against Thompson and Wallace and forwarded the transcript of the judgment for docketing to the recorder Farris at Susitna Station, [110] where it arrived by mail May 22, 1910, and was filed and recorded at 11:10 P. M. May 22d in that year was Sunday. At 8:30 P. M. of the same day the deed from Thompson to Cummings was also filed for record, Thompson delivering it to the recorder for that purpose. Cummings testified that the deed was at all times in his possession, from its execution until about May 18th, when, at Knik, he gave it to a man named Beede, who was going to Susitna Station, with instructions to give it to the recorder. Thompson testified that Beede delivered it to him (Thompson) with the request that he have it recorded for Cummings. Beede was dead at the time of the trial. Thompson testifies that he retained possession as owner of the one-half of the saloon business from the time he purchased it back from Cummings until October, 1910, when he sold it, during which time he gave the mortgage to Murphy for $1,100.

This suit to set aside the transfer to Cummings was brought in October, 1910.

Cummings testifies that the placer claim was worked on a three-year lease given by him in June,

1910, for 25% royalty. There is no evidence that Cummings had any representative at any time upon the ground to look after his interest in the "clean-up" or at any other time. The evidence shows that the defendant Thompson visited the claim at a time when there was trouble with other claim owners over the water used on the placer.

J. L. REED, Esq., and
E. E. RITCHIE, Esq.,
Attorneys for Plaintiff.

S. O. MORFORD, Esq., and
THOMAS R. SHEPARD, Esq.,
Attorneys for Defendants.

Authorities cited by plaintiff:

20 Cyc. 750, 751, 491, 344, 345, 440, 244, 442, 444, 447, 448, 449, 450, 541, 451, 543, and cases cited at the various pages mentioned.

Sections 96 & 98, Part 5, Carter's Codes. **[111]**

Crossley et al. v. Campion Mng. Co., 1 Alaska, 391.

Authorities cited by defendants:

Sections 130, 133 and 134, Part 5, and Section 1043, Part 4, Carter's Codes.

Rule v. Bolles, 27 Oregon, 368.

Jones on Evidence, 2nd Ed., 233.

Crawford v. Neal, 144 U. S. 596, 36 Law Ed. 556.

Johnson v. McGrew, 11 Iowa, 151, 77 Am. Dec. 137.

Bamberger, Bloom & Co. v. Schoolfield et al., 106 U. S. 149, 40 Law Ed. 374.

Shelly v. Booth, 39 Amer. Dec. 481.

Ruhl v. Phillops, 48 N. Y. 125, 8 Amer. R. 522.

Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614.
Ziska v. Ziska, 23 L. R. A. 28.
Wells v. Dalrymple, Fed. Cases No. 17392.
Smith v. Ingles, 2 Ore. 43.
In re Estes, 3 Fed. 134.
Miller v. Sherry, 69 U. S. 237, 17 Law Ed. 827.
Jones v. Simpson, 116 U. S. 610, 29 Law Ed. 742.
Prewit v. Wilson, 103 U. S. 24, 26 Law Ed. 363.
Wheaton v. Sexton's Lessee, 4 Wheaton, 502, 4 Law Ed. 627.
Jenkins v. Einstein, 3 Bliss, 128.
Gaylord v. Kelshaw, 17 Law Ed. 613.
Astor v. Wells, 4 Wheaton, 466, 4 Law Ed. 616.
Coolidge et al. v. Heneky et al., 11 Ore. 327.
Stearns v. Gage, 79 N. Y. 102.
Parker v. Connor, 93 N. Y. 118.
Stewart v. English, 6 Ind. 176.
14 Enc. Law 291 and cases cited.

Sections 260 and 262, Part 4, Carter's Codes, provide:

"Sec. 260. Immediately after the entry of judgment in any action the clerk shall docket the same in the judgment docket. At any time thereafter, while an execution might issue upon such judgment, and the same remains unsatisfied in whole or in part, the plaintiff, or in case of his death his representative, may file a certified transcript of the original docket in the office of the recorder of any recording district that may have been established in said district in accordance with law. Upon the filing of such transcript the recorder shall docket the

same in the judgment docket in his office. From the day of docketing a judgment as in this chapter provided, or the transcript thereof, such judgment shall be a lien upon all the real property of the defendant within the recording district or districts where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon."

"Sec. 262. A conveyance of real property or any portion thereof or interest therein shall be void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be."

Chapter 14, Part 4, of this code provides for the attachment of real property at the time of commencing suit or afterwards. Section 140 prescribes the method of levy and section 142 provides that in order to preserve the lien of the levy the [112] marshal's certificate of the levy must be filed with the recorder within ten days from the attachment.

Section 274 regulates the enforcement of execution upon a judgment, subdivision 4 of that section providing:

"Fourth. Property shall be levied on in like manner and with like effect as similar property is attached, as provided in sections 140, 141 and 143, omitting the filing of the certificate provided for in section 142."

Section 1043 provided:

"Sec. 1043. Every sale or assignment of per-

sonal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed prima facie to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration, during the time such property remains in the possession of said vendor or assignor."

Sections 96, 98 and 130, Part 5, provide:

"Sec. 96. The commissioner shall certify upon each conveyance recorded by him the time when it was received and the reference to the book and the page where it is recorded, and every conveyance shall be considered as recorded at the time it was so received."

"Sec. 98. Every conveyance of real property within the district hereafter made which shall not be filed for record as provided in this chapter shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

"Sec. 130. Every conveyance or assignment in writing or otherwise of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits,

damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void."

The questions argued by counsel have gone to the *bona fides* of the sale from Thompson to Cummings and the right of the plaintiff to maintain the suit in any event.

While under section 1043, *supra,* the fraud presumed from want of change in possession is confined to personal property, yet in this case where both real and personal property was transferred [113] by one instrument, which property constituted the entire estate of the debtor and there was no actual change of possession of any of the property until long subsequent, this taken in connection with the various circumstances above pointed out is sufficient to shift the burden of evidence as to the *bona fides* of the sale from the plaintiff to the defendants. Many circumstances may be mentioned of the class ordinarily denominated badges of fraud.

Close and intimate relations existing between the parties to the transaction claimed to be fraudulent.

Suit pending against the grantor approximately for an amount equal to the value of the property.

Insolvency of the grantor—the value of all his property was at the time of transfer about $1,500; his debts known to grantee other than that involved in the pending suit amounted to $2,800.

Unusual delay in recording conveyance.

A sale of all his property of mixed character to one grantee.

That at the time of purchase the property was unknown to the grantee.

That it was bought without an attempt to examine or request by the grantee for time to examine.

That grantee did not take possession, but that the grantor continued in possession and continued to show interest in and care for the property after the transfer.

That the grantee did not exhibit ordinary interest in or attention to it after the transfer.

That the instrument of transfer was left with or delivered to the grantor.

That it was hurriedly recorded by the grantor at an unusual time, to wit, 8:30 Sunday night.

That no vouchers or documentary evidence of any kind to support the transaction are introduced or offered.

That so few of the acts of the parties to the transaction were done in the ordinary manner.

That without an examination of the property the grantee sold back to the grantor the saloon for $400, which grantor was immediately able to mortgage for $1,100.

It is believed that these with other unusual circumstances warrant the conclusion that the transfer was made to Cummings to hinder, delay and defraud Thompson's creditor, the plaintiff; [114] that Cummings knew of the fraudulent purpose and was a party to it. He admits that immediately prior to the transfer he knew that defendant Thomp-

son intended leaving the territory permanently. He was acquiring all of Thompson's property and he knew Thompson owed twice as much as it was worth, outside of the claim on which suit was pending. It is no answer to say that he did not think there would be a recovery in that suit.

Besides this admitted knowledge prior to the transfer on his part, many of the circumstances mentioned above are of a character to disclose the prior purpose. Defendants have undertaken to explain many of the unusual circumstances, but their number is too great and the explanations do not satisfy.

It is concluded that there was no valuable consideration for the transfer.

It is argued by defendants that plaintiff cannot recover because he had not brought himself into such privity with the property as to entitle him to sue to set aside the transfer, no matter how fraudulent it might be.

Defendants are right to this extent—under our law there is no lien upon personal property until the actual levy of the writ of attachment or execution, which must be by taking into custody from which time the attaching plaintiff is deemed a purchaser in good faith for value.

Sections 140 and 141, Part 4, Carter's Codes.

This lien he must have before he can maintain a suit to void the transfer.

> "And since a judgment does not operate as a lien upon personalty, if the creditor seeks aid in regard to the personal estate of the debtor he

must show not only a judgment but also an execution giving him a legal preference or lien upon the debtor's goods and chattels."

20 Cyc., p. 696, and citations, note 15.

Under the Alaskan code a judgment is made a general lien by statute upon all of the defendant's real estate and a levy is [115] not necessary to create a lien.

Sec. 260, Part 4, Carter's Codes, *supra.*

"Under the statutes of many of the states the lien of a judgment attaches to the real estate of a debtor when the judgment or a transcript of it is recorded or filed in the proper office of the county where the land is situated. Where this is the case a creditor may file his bill to set aside a fraudulent conveyance as soon as he has obtained a judgment without issuing execution thereon, if the action is brought for the purpose of making his lien more available and efficient and in aid of an execution thereafter to be issued."

20 Cyc., page 697.

"Where a creditor is required to cause execution to be issued upon his judgment before suing to set aside the conveyance, whether he must cause the execution to be actually levied upon the subject of the conveyance will usually be found to depend upon whether a levy is necessary to create a lien. In some states the statute provides that a levy must be made to preserve the lien of the judgment if the prop-

erty sought to be reached is capable of being levied on. But where a specific lien upon the real estate of the debtor has been acquired by the filing of a judgment or the issuance of execution thereon and the action is brought in aid of the lien, a levy of the execution is not required. And a levy is not necessary if it would be of no practical utility."

20 Cyc., page 698.

Subdivision 4 of Section 274, Part 4, Carter's Codes, provides:

"Property (real) shall be levied on (by execution after judgment) in like manner and with like effect as similar property is attached as provided in Sections 140, 141 and 143, *omitting the filing of the certificate provided for in Section 142.*",

From the above quotation, by comparing its provisions with sections 140 and 141, *supra*, it is apparent that a levy after judgment is not necessary or contemplated for the preservation of the judgment lien.

"When the debtor has clouded the title to real property by an encumbrance or fraudulent transfer of it, the judgment creditor may proceed at once to have it removed. He obtains a lien upon the land when he recovers his judgment, and he has the right to stop there and proceed to have the title freed from its obscurity. The suit in that case is to aid his remedy at law, and he is not required even to issue an execution. (3 Pomeroy's Eq. Jur., sec.

1415, note 4; Mohawk Bank v. Atwater, 2 Paige, 54; Parshall v. Tillou, 13 How. Pr. 7.)"

Multnomah Street Ry. Co. v. Harris, 13 Ore. 198, at 200.

"Counsel for defendant insist that plaintiffs have no standing in equity without first bringing themselves in privity with the property sought to be reached by this suit by attachment or judgment lien, but we think the authorities he cites in support of his position are inapplicable here. * * * In Fleischner v. Bank of McMinnville, 35 Ore. 553, at 562 (60 Pac. 603), Mr. Justice [116] Bean cites this case (Dawson v. Coffey, 12 Ore. 513, at 519, 8 Pac. 838), with approval in support of the statement: 'It is settled that before a creditor can maintain a bill to set aside the fraudulent conveyances of his debtor he must either establish his claim by judgment, or acquire a lien by attachment.' See, also, numerous Oregon cases cited. Therefore plaintiffs have done all the law requires of them and all that they could do by reducing their claims to judgment and having executions returned *nulla bona.*"

Williams v. Commercial Nat. Bk., 49 Ore. 492, at 501 and 2.

"The filing of the transcript of the judgment in La Plata county fastened a lien securing its payment upon the interests of the coal and coke company in its real estate in that county, under the statutes of Colorado. * * * The argument that this lien was insufficient upon which

to base a suit in equity to remove the fraudulent trust deed, because it was a general lien created under the statutes, and not a specific lien fixed by the levy of an execution, finds no support in the authorities, and fails to appeal to the reason with persuasive force. * * * In the case at bar all the property which the judgment debtor has is real estate in La Plata county. The judgment is a lien upon all this property. The levy of an execution upon it could not make this lien more specific or more efficient, and the conclusion is irresistible that the general lien upon real estate created by entering a judgment or filing a transcript of it in the county where the lands of the debtor are situated, in accordance with the statutes which provide therefor, is sufficient basis for the maintenance of a suit in equity to remove a fraudulent obstruction to the enforcement of that lien. Bump Fraud. Conv. 535; Black Judgm., sec. 400."

Schofield v. Ute Coal & Coke Co., 92 Fed. 269, at 271 and 2.

"The judgments involved here are made liens by statute. They would not have been made more binding by the issuance of an execution on each of the several judgments. The defendant in judgment owned no property in his own name subject to execution. The property on which the lien was fixed by the judgments was held, it is alleged, in secret trust for the judgment defendant. The corporation that so held it had, according to the averments of the bill, been chartered

to be used as a cloak to defraud the plaintiffs. The property, with its title so incumbered, would not sell under execution for nearly its value. On these facts we hold that equity has jurisdiction without the issuance of executions on the judgments. Schofield v. Coke Co., 34 C. C. A. 34, 92 Federal, 269; McCalmont v. Lawrence, 1 Blatchford, 232, Fed. Cases No. 8676; Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004."

Lazarus Jewelry Co. v. Steinhardt, 112 Fed. 614, at 618 and 19.

The following cases cited by the defendant are inapplicable.

In Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614, the judgment creditor had failed to acquire his lien by filing a transcript of it with the recorder.

In Smith v. Ingles, 2 Ore. 43, the judgment debtor paid the purchase money to buy land and took the title in his son's name. This equitable interest was held not subject to the lien of a [117] judgment because the title never had been in the judgment debtor. The title once being in him a void transfer will not remove it from the grasp and hold of the judgment creditor's lien and equity where only parties to the fraud are before the Court.

That this was the effect of the Court's ruling in that case is shown by the decision of the same Court referring thereto in Holmes v. Wolfard, 47 Ore. 93, at 100.

The defendant also cites In re Estes, 3 Fed. 134. In this case it was held that in Oregon a judgment would be no lien on property theretofore fraudu-

lently conveyed. There were other parties equitably interested before the Court in that case than the judgment debtor and the parties to the fraud. The suit there did not involve the right of such a judgment debtor to maintain a suit to void the transfer. The ruling was made on the authority of Miller v. Sherry, 69 U. S. 237. In the latter case it was not contended that the judgment was a lien, and it was held that the filing of the judgment creditor's bill itself constituted an equitable levy.

It will be seen that these cases are not directly in point and that they are not recent.

> "A strong purpose is manifested in the more recent statutes and decisions of the Courts to enlarge and strengthen the creditor's remedies against the property of the debtor."
>
> 20 Cyc. 341 and 655 *et seq.*

It is argued by the defendants that as the complaint alleges the ownership of the property and its possession at all times by the defendant Thompson, that therefore there was an adequate remedy at law and this suit will not lie. This position does not satisfy the conscience. Thompson had executed and recorded a deed purporting to convey all his property and had mortgaged a part of it. There was no executed or recorded reconveyance to him of the saloon business. The mortgage thereon was [118] for more than the property was worth, and altho he says now that it has been paid, no record or knowledge on plaintiff's part of that fact is shown. Thompson was still claiming to rent the saloon building from Cummings. The plaintiff was not under

these circumstances compelled to court lawsuits with the grantee and mortgagee of Thompson by levies and sales before bringing a suit to set aside the fraudulent conveyances.

It is therefore concluded that this suit will lie and plaintiff prevail, so far as the property fraudulently transferred may be considered real property and that he must fail so far as it is personal, for want of a lien thereon before bringing suit and because parties not before the Court are shown to have acquired it.

The pleadings and the deed offered in evidence by the defendants describe the property as—

> "That certain Placer Mining Claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.
>
> An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Prices' saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.
>
> That certain log house adjacent to John Jones' bath-house, and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party; and also that certain log cabin situated in the rear of said log house, with all chattels or other property therein contained."

The foregoing is all that is shown as to the character of title or property. That which in the con-

veyance defendants have treated as real estate, the mining claim, the saloon building and lot, will be held to be so, and that which is treated as personal property, that is, the saloon, stock, cigar business, license, the log house adjacent to the bath-house, together with the chattels therein and the log cabin situated in the rear will be held to be so.

If these two buildings were upon public land, which in the absence of all evidence will be presumed, there would be an [119] implied license to remove and they would be personal property.

The prayer of the plaintiff in his amended complaint is granted except as to this personal property.

Done in open court this 27th day of April, 1911.

EDWARD E. CUSHMAN,
District Judge.

Entered Court Journal No. 6, page No. 757–766.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 27, 1912. Ed. M. Lakin, Clerk. [120]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,
Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,
Defendants.

Findings of Fact and Conclusions of Law.

It appearing to the satisfaction of the Court by the proofs on file herein that personal service of the summons herein, together with a copy of complaint and amended complaint certified to by plaintiff's attorney, was made on the defendants Eri Thomspon and J. M. Cummings, and that upon the issues joined by the pleadings herein and this cause coming on regularly for trial on the 17th day of February, A. D. 1912, and E. E. Ritchie and J. L. Reed appearing as counsel for the plaintiff and S. O. Morford, Esq., appearing for the defendants, the case was tried before the Court, whereupon documentary evidence and the depositions duly taken upon interrogatories of H. S. Farris and Hugh Price were introduced in evidence by the plaintiff and the affidavit of S. O. Morford, Esq., as to what the defendant Eri Thompson would testify if present, and J. M. Cummings being duly sworn and examined on behalf of defendants and Al. Wolf and Arthur Meloche being duly sworn and examined in rebuttal on behalf of plaintiff, and the evidence being closed and arguments of counsel heard, and the Court, being fully advised in the premises, now makes the following findings of fact and conclusions of law herein:

FINDINGS OF FACT.

I.

That Thos. H. Meredith the plaintiff's assignor on the 25th day of April, 1910, recovered judgment in this court against Dave Wallace and Eri Thompson,

copartners, jointly and severally, in the sum of [121] One Thousand Five Hundred and Ninety-eight Dollars and Eighty Cents ($1,589.80), with interest thereon at the rate of eight per cent per annum from date until paid, and costs amounting to Thirty-two and 65/100 Dollars ($32.65), and that said judgment with costs and accruing costs is wholly unpaid and in full force and effect. That said judgment was granted in action No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners, as Wallace and Thompson, and the same was entered on the 25th day of April, 1910, and docketed by the clerk in the judgment docket, on the 29th day of April, 1910.

II.

That Thomas H. Meredith, the plaintiff's assignor, caused to be filed and docketed in the judgment docket a certified copy of the original docket of said judgment in cause No. 233, in the office of the recorder of Cook Inlet Recording District, District of Alaska, at 11:10 o'clock P. M., May 22, 1910, in Book 3, Orders and Judgments, page 1 of the records of said District.

III.

That Thomas H. Meredith, plaintiff's assignor, on the first day of July, 1910, caused to be issued an execution out of this court in action No. 233, and pursuant to said judgment which was thereafter duly returned by the United States Marshal of this Division wholly unsatisfied, on the 26th day of August, 1910; and thereafter, on the 22d day of September, 1910, an *alias* execution was duly issued out of said

court pursuant to said judgment, directed to the United States Marshal of the Third Division of Alaska, to levy upon, seize and take into execution personal property of Eri Thompson in said Third Division sufficient to satisfy said judgment and costs, and if sufficient personal property could not be found in said Division to satisfy said judgment, then and in that case to make the amount thereof out of the real property belonging to said defendant in said Division, not exempt from execution; and that said *alias* execution was in due course [122] thereafter returned into the clerk's office of this Court wholly unsatisfied, said return alleging that no property of said Eri Thompson could be found in said Division subject to execution and levy.

IV.

That Dave Wallace departed from the Territory of Alaska on or about the month of October, 1907, and that he has not returned to the said Territory since said date. That Dave Wallace has no property, real or personal, in the Territory of Alaska out of which plaintiff could satisfy his judgment.

V.

That on the 25th day of October, 1909, the defendant Eri Thompson executed a conveyance, in form a quitclaim deed, to the defendant, J. M. Cummings, purporting to convey to J. M. Cummings the following described property, situate, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Price's saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.

That certain log house adjacent to John Jones' bath-house, and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party; and also that certain log cabin situated in the rear of said log house, with all chattels or other property therein contained.

And caused said conveyance to be filed for record in the office of the Recorder at Susitna in Cook Inlet Recording District, District of Alaska, at 8:30 o'clock P. M., May 22d, in Book 3 of Deeds, page 424. [123]

VI.

That said conveyance conveyed all of the property, real and personal, of the defendant Eri Thompson in the Territory of Alaska out of which plaintiff could satisfy his judgment herein, and was made with intent to defraud the creditors of the said Eri Thompson.

CONCLUSIONS OF LAW.

I.

That Dave Wallace departed from the Territory of Alaska with intent to defraud and defeat plaintiff in the collection of his judgment in cause No. 233, and with intent of hindering, delaying and defrauding Thomas H. Meredith, plaintiff's assignor, in the collection of the same, and that the said Dave Wallace is insolvent.

II.

That on the 12th day of January, 1912, Thomas H. Meredith assigned, set-over and transferred to J. L. Reed, the plaintiff herein, all his interest in the judgment in cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners as Wallace and Thompson, for a valuable consideration.

III.

That the conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings conveyed all the property, real and personal, of the defendant Eri Thompson, and was made with the intent to hinder, delay and defraud the creditors of Eri Thompson, and for which there was no valuable consideration, and that said conveyance is null and void, against plaintiff's judgment in cause No. 233 entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners, as Wallace and Thompson, and is null and void as against plaintiff in this action.

IV.

That the said Eri Thompson is insolvent. [124]

V.

That the plaintiff has a lien against the real property belonging to the defendant Eri Thompson described in the conveyance executed by Eri Thompson to J. M. Cummings, dated the 25th day of October, 1909, described as follows, situate, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

> That certain Placer Mining Claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.
>
> An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Price's saloon and the lot or parcel of land whereon said saloon is situated.

—as of and from the time of the filing and docketing in the judgment docket a certified copy of the original docket of the judgment in cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners, as Wallace and Thompson, in the office of the Recorder of the Cook Inlet Recording District, District of Alaska, to wit, at 11:10 o'clock P. M., May 22d, 1910, and that said lien is superior to and unaffected by the said conveyance between Eri Thompson and J. M. Cummings and the filing and recording of same in the office of the recorder at Susitna, Cook Inlet Record-

ing District, District of Alaska.

Done in open court this 4th day of May, 1912.

EDWARD E. CUSHMAN,
District Judge.

Entered Court Journal No. 6, page No. 781.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 4, 1912. Ed M. Lakin, Clerk. By Thos. S. Scott, Deputy. [125]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,
Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,
Defendants.

Judgment.

This cause came on for hearing on the 17th day of February, A. D. 1912, and was heard upon the amended complaint, answers, reply, exhibits, depositions, affidavit, proof in the cause and arguments of counsel and the cause was submitted to the Court for consideration and decision, and after deliberation thereon and the Court having rendered its decision therein, files its findings of fact and conclusions of law in writing.

Wherefore, it is by the Court ordered, adjudged and decreed that the conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M.

Cummings purporting to convey to J. M. Cummings the following described property, situate, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.

An undivided one-half interest in and to that certain saloon situated in the town of Susitna, Alaska, known as Thompson and Price's saloon; together with and including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated.

That certain log house adjacent to John Jones' bath-house and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna; together with all fixtures and chattels therein contained, owned by said first party; and also that certain log cabin [126] situated in the rear of said log house, with all chattels or other property therein contained.

—was made with intent to hinder, delay and defraud the creditors of the said Eri Thompson, and is void as against plaintiff's judgment rendered in cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners, as Wallace and Thompson and as against plaintiff in this action.

It is further ordered, adjudged and decreed that plaintiff be and is hereby declared and adjuged to

have a valid lien under his judgment given and entered in cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners as Wallace and Thompson, and in this action upon the real property described in said purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings, described as follows, to wit, situated, lying and being in Susitna, Cook Inlet Precinct, Third Judicial Division, Territory of Alaska, particularly described as follows, to wit:

> That certain placer mining claim known as the Battle Axe, located on Thunder Creek, a tributary of Cache Creek, in Cook Inlet Mining and Recording Precinct.
>
> An undivided one-half interest in and to that certain saloon building situated in the town of Susitna, Alaska, known as Thompson and Price's saloon; and the lot or parcel of land whereon said saloon building is situated.

And that said lien commences and dates from the 22d day of May, 1910, and it is hereby adjudged that the said described real property be and is subject to plaintiff's lien, and that the filing and recording of said purported conveyance dated the 25th day of October, 1909, executed by Eri Thompson to J. M. Cummings, is hereby cancelled, vacated and set aside in so far as the same conflicts with plaintiff's judgment or rights thereunder or plaintiff's lien. [127]

And it is further ordered, adjudged and decreed that the plaintiff in this action is at liberty to proceed upon his executions heretofore issued upon the

judgment in cause No. 233, entitled Thomas H. Meredith, plaintiff, vs. Dave Wallace and Eri Thompson, copartners as Wallace and Thompson, or to issue another execution and combine in one execution the principal, and interest and attorney fees and costs of suits and expenses of sale and disbursements in cause No. 233 and in this action, as he may be advised; and should plaintiff so elect to proceed under one execution, he shall after deducting the expenses of sale, costs, disbursements and attorney fee of this action, apply the surplus to the satisfaction of his judgment in cause No. 233.

Judgment is also rendered against defendant Eri Thompson and J. M. Cummings for the costs and accruing costs and disbursements of this action, taxed at $86.60, for which an execution will issue.

Done in open court this 4th day of May, 1912.

EDWARD E. CUSHMAN,
District Judge.

Entered Court Journal No. 6, page No. 784.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 4, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [128]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,
Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,
Defendants.

Petition for Allowance of Appeal, and Assignment of Errors.

To the Hon. EDWARD E. CUSHMAN, District Judge Presiding in the Above-named Court:—

Now come Eri Thompson and J. M. Cummings, the defendants in the above-entitled cause, and, feeling themselves aggrieved by the proceedings had therein in the above-named district court, and by the judgment rendered and entered therein by said court on the fourth day of May, 1912, decreeing to the plaintiff in said cause certain relief of an equitable nature against said defendants as therein fully set forth, and further rendering judgment in said plaintiff's favor against said defendants for costs taxed at the sum of $86.60, hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth District, and they humbly petition the above-named District Court for an order allowing their said appeal and fixing the amount of security for the costs of said appeal to be given by said appellants thereon, and also fixing the amount of a separate bond to be given by them thereon in order to supersede the effect and enforcement of said judgment appealed from pending the hearing and determination of said appeal.

And said defendants and appellants specify the following as the errors upon which they will rely on their said appeal, to wit:

ASSIGNMENT OF ERRORS.

1.

That the above-named District Court erred in

overruling the demurrer of said defendant Thompson to the amended complaint of the plaintiff in said cause. [129]

2.

That said District Court erred in overruling the demurrer of said defendant J. M. Cummings to the amended complaint of the plaintiff in said cause.

3.

That said District Court erred in holding, on the trial of said cause and as set forth in its opinion and decision therein filed on April 27, 1912, in substance and effect that the burden of the evidence as to the *bona fides* of the sale in question in said cause was shifted from the plaintiff to the defendants.

4.

That said District Court erred in holding, in its said opinion and decision in said cause, that the original plaintiff therein had brought himself into privity with the real property in question in said cause, so as to have a standing in equity to maintain said action to set aside the transfer thereof for fraud against creditors.

5.

That said District Court erred in holding, in its opinion and decision in said cause, that the original plaintiff therein, before instituting said cause, had exhausted his remedy at law against said defendant Thompson for the enforcement of said plaintiff's judgment at law against him.

6.

That said District Court erred in holding, in its

said opinion and decision in said cause, that the mining claim in question was real estate and could therefore be reached in said cause in equity without an execution having been first levied thereon for the enforcement of said original plaintiff's judgment at law against said defendant Thompson.

7.

That said District Court erred in holding, in its said opinion and decision in said cause, that the saloon building and lot in [130] question were real estate and could therefore be reached in said cause in equity without an execution having been first levied thereon for the enforcement of said original plaintiff's judgment at law against said defendant Thompson.

8.

That said District Court erred in finding, in its finding of fact No. VI set forth in its findings of fact and conclusions of law filed in said cause on the 4th day of May, 1912, in substance and effect that the conveyance therein mentioned was made with intent to defraud the creditors of said defendant Thompson.

9.

That said District Court erred in making its so-called "conclusion of law" No. 1 set forth in its said findings of fact and conclusions of law.

10.

That said District Court erred in making its so-called "conclusion of law" No. 2 set forth in its said findings of fact and conclusions of law.

11.

That said District Court erred in making its con-

clusion of law No. 3 set forth in its said findings of fact and conclusions of law.

12.

That said District Court erred in making its so-called "conclusion of law" No. 4 set forth in its said findings of fact and conclusions of law.

13.

That said District Court erred in making its conclusion of law No. 5 set forth in its said findings of fact and conclusions of law.

14.

That said District Court erred in finding for the plaintiff in said cause on the issue of fraud.

15.

That said District Court erred in finding for the plaintiff in said cause on the issue of lack of consideration. [131]

16.

That said District Court erred in rendering said judgment hereby appealed from, in favor of said plaintiff and against said defendants in said cause.

Wherefore, said defendants and appellants pray that said judgment may be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, with directions for such further proceedings in said District Court as may be proper.

S. O. MORFORD, (T. R. S.)

Attorney for Eri Thompson, Defendant and Appellant.

THOMAS R. SHEPARD,

Attorney for J. M. Cummings, Defendant and Aplant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 15, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [132]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Order Allowing Appeal and Fixing Amount of Bond for Costs and Amount of Bond for Supersedeas in Appeal.

Eri Thompson and J. M. Cummings, the defendants in the above-entitled cause, having this day filed in the above-named court their petition for allowance of an appeal on their part from the judgment rendered and entered therein by said court on the 4th day of May, 1912, with their assignment of errors upon which they will rely on said appeal, appended to said petition, and having presented their said petition and assignment of errors to the undersigned District Judge, presiding in said court, and moved thereon for an order allowing said appeal and fixing the amount of security for the costs of said appeal to be given by them thereon, and also fixing the amount of security for the costs and damages of said appeal to be given by them thereon in order to operate as a supersedeas of said judgment pend-

ing the determination, in case they shall be advised to give such supersedeas bond, and the undersigned having considered said petition and being fully advised on the premises;

On motion of Messrs. S. O. Morford and Thomas R. Shepard, attorneys for said defendants and appellants, it is ordered as follows:

First, that the appeal of said defendants prayed for in and by their petition be and it hereby is allowed;

Secondly, that the amount of the bond to be given by said appellants for the costs of said appeal (but not to operate as a supersedeas) be and it hereby is fixed at the sum of $500, and that upon the filing of a bond for costs on said appeal in said sum conditioned as prescribed [133] by the statute in such case made and provided and approved by the undersigned, said appeal shall become effective;

Thirdly, that the amount of a further bond thereafter to be given by said appellants for the costs and damages of said appeal, in order to operate as a supersedeas of said judgment pending the determination of said appeal, in case they shall be advised to give such supersedeas bond, be and it hereby is fixed at the sum of $2,500, and that upon the filing of such a supersedeas bond in said sum, conditioned as prescribed by the statute in such case made and provided and approved by the undersigned, within the time prescribed by law for a supersedeas on appeal, further proceedings upon said judgment shall be stayed until the determination of said appeal and

the filing of a mandate thereon in this court.

Done in open court, this 15th day of May, 1912.

EDWARD E. CUSHMAN,

District Judge, Presiding in the Above-named Court.

Entered Court Journal No. 6, page 828.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 15, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [134]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,

Plaintiff,

vs.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Bond on Appeal.

Know All Men by These Presents, that we, Eri Thompson, a defendant in the above-entitled action (by S. O. Morford, his attorney in said action, hereunto duly authorized), and J. M. Cummings, a defendant in said action (by Thomas R. Shepard, his attorney in said action, hereunto duly authorized), as principals, and John A. Nelson, of Seward, Alaska, and W. M. Sauers, of Seward, Alaska, as sureties, are held and firmly bound unto J. L. Reed, the plaintiff in said action, in the penal sum of Five Hundred Dollars ($500.00), lawful money of the

United States of America, to be paid to said obligee, his representatives or assigns; for which payment, well and truly to be made, we bind ourselves and our respective heirs and representatives, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 10th day of May, 1912.

The condition of this obligation is such that, whereas lately, at a session of the District Court for the District of Alaska, Third Division, holden at Valdez in said third division, in an action pending in said court between the above-named obligee J. L. Reed, the plaintiff therein, and the above-named principal obligors Eri Thompson and J. M. Cummings, the defendants therein, a judgment and decree was made and entered by said court on the 27th day of April, 1912, in favor of said plaintiff and against said defendants, and said defendants are about to appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit: [135]

Now, therefore, the condition of this obligation is such, that if said principal obligors, defendants and appellants as aforesaid shall prosecute their said appeal to effect, and answer all costs if they fail to

make their plea good, then this obligation shall be void; else valid.

ERI THOMPSON. [Seal]
By S. O. MORFORD,
His Attorney.
J. M. CUMMINGS, [Seal]
By THOMAS R. SHEPARD,
His Attorney.
JOHN A. NELSON. [Seal]
W. M. SAUERS. [Seal]

In presence of
CURTIS R. MORFORD.
M. S. BANBURY.

United States of America,
District of Alaska,—ss.

John A. Nelson and W. M. Sauers, being first duly sworn, each for himself deposes and says: That he is one of the persons named as sureties in and who executed the foregoing bond on appeal; that he is a resident within the District of Alaska, and is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; and that he is worth double the amount specified in said bond as the penal sum thereof, over and above all debts and liabilities, and exclusive of property exempt from execution.

JOHN A. NELSON.
W. M. SAUERS.

Subscribed and sworn to before me this 10th day of May, 1912.

CURTIS R. MORFORD,
Notary Public in and for the District of Alaska, Residing at Seward.

The foregoing bond is approved by me as a sufficient bond for costs on the appeal therein mentioned, this May 15th, 1912.

EDWARD E. CUSHMAN,
District Judge. [136]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 15, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [137]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,
Plaintiff and Appellee,
vs.
ERI THOMPSON and J. M. CUMMINGS,
Defendants and Appellants.

Supersedeas Bond on Appeal.

Know All Men by These Presents, that we, Eri Thompson, a defendant in the above-entitled action (by S. O. Morford, his attorney in said action, hereunto duly authorized), and J. M. Cummings, a defendant in said action (by Thomas R. Shepard, his attorney in said action, hereunto duly authorized), as principals, and W. A. McNeiley, of Seward, Alaska, and W. M. Sauers, of Seward, Alaska, as sureties, are held and firmly bound unto J. L. Reed, the plaintiff in said action, in the penal sum of Two Thousand Five Hundred Dollars ($2,500), lawful

money of the United States of America, to be paid to said obligee, his representatives or assigns; for which payment, well and truly to be made, we bind ourselves and our respective heirs and representatives, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 24th day of May, 1912.

The condition of this obligation is such that, whereas, lately, at a session of the District Court for the District of Alaska, Third Division, holden at Valdez, in said third division, in an action pending in said court between the above-named obligee J. L. Reed, the plaintiff therein, and the above-named principal obligors Eri Thompson and J. M. Cummings, the defendants therein, a judgment and decree was made and entered by said court on the 4th day of May, 1912, in favor of said plaintiff and against said defendants, and said defendants have appealed from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and have given a bond as required by law for the costs of said appeal, and have served upon the adverse party a citation [138] duly issued in pursuance of said appeal, and desire now, within sixty days after the rendering of said judgment and decree, to give a further bond to supersede said judgment and stay the execution thereof until the determination of said appeal, as provided by law —the amount of which supersedeas bond has been fixed, in and by the order made by said district court in said action on the 15th day of May, 1912, allowing said appeal, at $2,500:

Now, therefore, the condition of this obligation is such that if said principal obligors, defendants and appellants as aforesaid, shall prosecute their said appeal to effect, and, if they fail to make their plea good, shall answer all damages and costs, then this obligation shall be void; else, valid.

ERI THOMPSON. [Seal]
By S. O. MORFORD,
His Attorney.
J. M. CUMMINGS. [Seal]
By THOMAS R. SHEPARD,
His Attorney.
W. A. McNEILEY. [Seal]
W. M. SAUERS. [Seal]

In presence of
CURTIS R. MORFORD.
J. H. ROMIG.

United States of America,
District of Alaska,—ss.

W. A. McNeiley and W. M. Sauers, being first duly sworn, each for himself deposes and says: That he is one of the persons named as sureties in and who executed the foregoing bond on appeal; that he is a resident within the District of Alaska, and is not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; and that he is worth Two Thousand Five Hundred Dollars ($2,500), the amount specified in said bond as the penal sum thereof, over and above all debts and liabilities, and [139] exclusive of property exempt from execution.

W. A. McNEILEY.
W. M. SAUERS.

Subscribed and sworn to before me this 24th day of May, 1912.

[Seal] CURTIS R. MORFORD,
Notary Public in and for the District of Alaska.

The foregoing supersedeas bond is hereby approved by me, as to form, sufficiency and sureties, this 27th day of May, 1912.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 25, 1912. Ed. M. Lakin, Clerk. [140]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,
Plaintiff and Appellee,
v.
ERI THOMPSON and J. M. CUMMINGS,
Defendants and Appellants.

Order Enlarging Time for Docketing Case on Appeal.

Good cause for this order being shown by the affidavit of Thomas R. Shepard this day presented to me, it is ordered, on motion of the appellants in this cause, that the time within which said appellants are required, by the rules of the United States Circuit Court of Appeals for the Ninth Circuit, to file the record and docket the case on their appeal herein with the clerk of said court at San Francisco, Cal-

ifornia, be and it hereby is enlarged until and including the 14th day of July, 1912.

Done in court at Cordova, Alaska, this 25th day of May, 1912.

EDWARD E. CUSHMAN,
District Judge.

Entered Court Journal No. C.—1, page 282.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 25, 1912. Ed. M. Lakin, Clerk. [141]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,
Plaintiff and Appellee,
v.
ERI THOMPSON and J. M. CUMMINGS,
Defendants and Appellants.

Order Further Enlarging Time for Docketing Cause on Appeal.

It sufficiently appearing to the undersigned that on account of the accumulation of business in the office of the clerk of this Court it will be impracticable for the clerk to prepare, certify and transmit the record on the pending appeal in this cause in time for the filing of said record and the docketing of the cause on said appeal in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within the time limited

therefor by the citation issued on said appeal and the previous order of this court enlarging said time, on motion of the appellants' attorneys it is ordered, by the Court now here, that said time be and it is further enlarged until and including the 31st day of July, 1912.

Done in open court, this 29th day of June, 1912.

EDWARD E. CUSHMAN,
District Judge.

Entered Court Journal No. 6, page No. 857.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 29, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [142]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,

Plaintiff,

v.

ERI THOMPSON and J. M. CUMMINGS,

Defendants.

Order Touching Transcript of Evidence and Record on Appeal.

Upon the stipulation between the parties to this cause appended to the certified transcript of evidence herein and filed with said transcript on the 22d day of June, 1912, and on motion of the defendants' attorneys, it is ordered by the Court now here, in accordance with said stipulation, that the clerk

of this Court, in making up, certifying and transmitting the record on appeal herein, do include said original transcript of evidence, with the original exhibits therein referred to or certified copies of such of said exhibits as are parts of the files and record in cause No. 233 in this Court, in such record on appeal as a part thereof, instead of making a copy of said transcript of evidence and said exhibits as a part of said record on appeal.

Done in open court this 29th day of June, 1912.

EDWARD E. CUSHMAN,
District Judge.

Entered Court Journal No. 6, page No. 856.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 29, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [143]

In the District Court for the Territory of Alaska, Third Division.

No. S. 9.

J. L. REED,
Plaintiff,

v.

ERI THOMPSON and J. M. CUMMINGS,
Defendants.

Citation.

United States of America,
District of Alaska,—ss.

The President of the United States of America: To J. L. Reed, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of

Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, on the 14th day of June, 1912, pursuant to an appeal filed in the Clerk's office of the United States District Court for the District of Alaska, Third Division, wherein Eri Thompson and J. M. Cummings are appellants and you are appellee, to show cause, if any there be, why the judgment rendered and entered by said District Court in the above-entitled cause, on the 4th day of May, 1912, and in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, and the seal of said District Court, this 15th day of May, 1912, and of the Independence of the United States the one hundred and thirty-sixth.

EDWARD E. CUSHMAN,
District Judge, Presiding in the District Court for the District of Alaska, Third Division.

[Seal] Attest: ED. M. LAKIN,
Clerk of the District Court for the District of Alaska, Third Division.

By Thos. S. Scott,
Deputy.

Service of the foregoing citation upon the undersigned, by delivery to him of a copy thereof, upon this 23d day of May, 1912, is hereby admitted.

J. L. REED,
Plaintiff, and One of Plaintiff's Attorneys. [144]

In the District Court for the Territory of Alaska, Third Division.

Certificate of Clerk District Court to Record.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Ed. M. Lakin, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 145 pages, numbered from 1 to 145, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the praecipe filed in my office on the 11th day of July, A. D. 1912.

That I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to $33.10, has been paid to me by S. O. Morford, Esq., one of the attorneys for the defendants and appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 12th day of July, A. D. 1912.

[Seal] ED. M. LAKIN,
Clerk.
By Thos. S. Scott,
Deputy Clerk. [145]

[Endorsed]: No. 2162. United States Circuit Court of Appeals for the Ninth Circuit. Eri Thompson and J. M. Cummings, Appellants, vs. J. L. Reed, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Received July 22, 1912.

F. D. MONCKTON,
Clerk.

Filed July 25, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

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ERI THOMPSON and
J. M. CUMMINGS,
Appellants,
v.
J. L. REED,
Appellee.

No. 2162.

Appeal from the United States District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

S. O. MORFORD,
Attorney for Appellant Thompson.
THOMAS R. SHEPARD,
Attorney for Appellant Cummings.

In the United States Circuit Court of Appeals for the Ninth Circuit

ERI THOMPSON and
J M. CUMMINGS,
Appellants,
v.
J. L. REED,
Appellee.

No. 2162.

Appeal from the United States District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal by the defendants from a decree for the plaintiff in a creditor's suit to subject to his execution on a judgment at law sundry property transferred by the appellant Thompson to the appellant Cummings prior to the recovery of that judgment. The amended complaint (printed Record, pp. 1-7) alleged (I) the recovery by the original plaintiff in this suit, Thomas H. Meredith, on April 25, 1910, of a judgment at law against the appellant Eri Thompson for $1,631.25, still unsatisfied; (II) the issuance of an execution thereon July 1, 1910, and its return unsatisfied on August 26th, and the issuance of an alias execution on September 2nd and its return unsatisfied, "in

due course thereafter;" (III) that about May 22, 1910, a deed from Thompson to the appellant J. M. Cummings was filed for record in the office of the recorder of the Cook Inlet precinct at Susitna, Alaska, purporting to convey the following property lying in said precinct, to-wit, (1) a placer mining claim known as the "Battle Ax," on Thunder Creek, (2) an undivided half interest in a saloon in the town of Susitna, Alaska, known as Thompson & Price's saloon, "including all fixtures, cigar and liquor license, and the lot or parcel of land whereon said saloon is situated," and (3) "that certain log house adjacent to John Jones' bath-house and lying between said bath-house and the general merchandise store of H. W. Nagley, in said Susitna, together with all fixtures and chattels therein contained owned by said first party, and also that certain log cabin situated in the rear of said log house, with all chattels therein contained;" (IV) "that said purported deed was not made in good faith nor for any valid consideration, but was a device for and was made and received with the intention of placing the property of said Thompson beyond the reach of creditors, and particularly of this plaintiff, and for the purpose of hindering, delaying and defrauding this plaintiff in the collection of his said judgment, and * * * * in consummation of a combination and conspiracy between said Thompson and said Cummings to defraud plaintiff and other creditors," and was made many months prior to the recovery of the plaintiff's judgment at law, but long after the action therefor was begun, but the deed was not filed for record till nearly

a month after the judgment was rendered nor until a transcript thereof had been sent for record to the recorder at Susitna, to make it a lien upon Thompson's real property in said precinct, and the deed was filed for record in said office about three hours before the filing of the transcript; (V) that Cummings has never taken possession of any of the property conveyed, real or personal, but it has remained in the custody and control of Thompson, who has at all times exercised the rights of ownership and is now in complete possession and control of all thereof; (VI) that the judgment referred to in paragraph I was recovered in cause No. 233 in the same court, against Dave Wallace and said Thompson, copartners as Wallace & Thompson, jointly and severally, and that Wallace left Alaska about October 1907 and has not since returned, and departed for the purpose of hindering, delaying, defrauding and defeating the plaintiff in the collection of his claim embraced in said judgment; (VII) that the personal property reconveyed by Cummings to Thompson as set forth in paragraph III of Cummings's answer was mortgaged by Thompson to one W. Murphy on July 14, 1910, the mortgage being recorded at Susitna on the 15th, and that said mortgage and deed were given and made for the purpose of hindering, delaying and defrauding the plaintiff in the collection of his judgment, that said mortgage and deed transferred all of Thompson's property, real and personal, in Alaska or elsewhere known to plaintiff, and out of which he could satisfy his judgment, and that Thompson is insolvent; and (VIII) that neither Wallace nor

Thompson has any property other than that transferred to Cummings and that mortgaged to Murphy out of which the plaintiff could satisfy his judgment, and (IX) he has no plain, speedy and adequate remedy at law.

The prayer of the amended complaint is for a decree declaring the deed from Thompson to Cummings to have been made without consideration and in fraud of Thompson's creditors and that it be vacated, set aside and held for naught, that the property therein described be decreed to be still Thompson's and subject to the lien of said judgment against him, for an injunction meanwhile against any transfer thereof, and for general relief. There is no prayer for costs.

The answer of Thompson (Record, pp. 16-20) denies that he was the owner of or had any interest in the property described in paragraph III of the amended complaint at any time since October 25, 1909, except an undivided half interest in the stock, liquors and licenses in the Thompson & Price saloon at Susitna, which interest was from Feby. 25, 1910, until May 19, 1911, his property and in his possession; (II) answering paragraph IV of the amended complaint, denies that the conveyance referred to was not made in good faith and for a valuable consideration, or was a device for or made and received with the intention of placing his property beyond reach of his creditors, for the purpose of hindering, delaying, etc., or was made or accepted in consummation of a conspiracy between the defendants to defraud the plaintiff, or in fraud of any person; (III) answering paragraph V of the amended

complaint, denies that Cummings has never taken possession of any of said property conveyed to him, and avers that Cummings has been since October 25, 1909, and he is informed and believes that he is now, the owner of all thereof except the undivided half interest in the stock and licenses of Thompson & Price's saloon; (IV) denies that his mortgage to Murphy, referred to in paragraph VII of the amended complaint, was made for the purpose of hindering, delaying or defrauding the plaintiff in the collection of his judgment, or in fraud of any person, and alleges that said mortgage has been fully paid and satisfied; further answering, (V) avers that he sold all of the property mentioned in the amended complaint to Cummings, about October 25, 1909, "for the sum of fifteen hundred dollars lawful money of the United States of America, which sum was fully paid," and that about Feby. 15, 1910, he repurchased from Cummings the undivided half interest in the saloon stock and business included in the previous sale, and immediately went into possession thereof and continued the owner and in possession until May 19, 1911; and (VI) further avers (1) that he was never indebted to Meredith (the original plaintiff in this cause) in any sum, and at no time was in partnership with Dave Wallace in the mining business, (2) that the judgment at law (on which this cause is based) was secured by fraud, perjury and mistake; (3) that at the time he made the sale to Cummings complained of, and for long prior thereto, he had been at Valdez, Alaska, endeavoring to secure a trial of the action of Meredith v. Thompson and Wal-

lace, that the plaintiff therein was not ready for trial, and that this defendant was informed by his attorney that no just cause of action existed against him, and (4) that he sold the property mentioned in the amended complaint to Cummings for full value and at a time when this defendant did not owe any debts in the Territory of Alaska, except on the saloon stock—which Cummings assumed.

Issue was joined by reply (Record, pp. 22-3) upon the new matter set up in paragraph V of this answer; and the new matter in paragraph VI was stricken out (Record, pp. 24-5) on demurrer thereto, except the fourth subdivision thereof, which was allowed to stand, whereupon the plaintiff put in a further reply joining issue thereon (Record, p. 25).

The answer of Cummings to the amended complaint (Record, pp. 11-15) alleges (I) that about October 25, 1909, he purchased from Thompson the properties mentioned and Thompson then and there executed a deed to him therefor, and delivered possession to him, and ever since that time he (Cummings) has been and now is the lawful owner and in lawful possession of all said property, except as below stated, and that on May 22, 1910, he recorded said deed at Susitna, that he denies that said property or any interest therein has been Thompson's at any time since the date of said deed, and that he has had any possession thereof since then, except as below stated, and avers that about Feby. 15, 1910, he sold and delivered to Thompson all his interest in the saloon stock and licenses and rented to him the saloon building and other buildings at Susitna

for $25 per month, and Thompson has since then had no right in said buildings other than as his (Cummings's) tenant; (II) answering the fourth paragraph, denies the bad faith, lack of consideration, fraud and conspiracy there alleged; (III) denies the whole of the fifth paragraph and (IV) denies knowledge, etc., as to the truth of the matters in the seventh paragraph; and alleges affirmatively (I) his purchase of all said property from Thompson on October 25, 1909, for $1,500 "lawful money of the United States of America, which sum was fully paid," and his resale and redelivery to Thompson, about Feby. 25, 1910, of the half interest in the saloon stock, licenses and business, and (II) that he had no knowledge or information that Thompson was on October 25, 1909, indebted to anyone, or that he sold him (Cummings) said property or any of it for the purpose of hindering, delaying or defrauding the plaintiff or anyone.

Issue was joined by reply (Record, pp. 20-21) upon the new matter in this answer.

The cause was tried at Seward, Alaska, on Feby. 17, 1912, to the extent of putting in the evidence on both sides (Record, pp. 31-115), and was then continued to the court's impending session at Valdez for the submission of written arguments and the rendering of the court's decision. On the day before the trial in Seward, the defendant Cummings moved for a continuance upon his attorney's affidavit (Record, pp. 27-30) setting forth, in substance, that the defendant Thompson was an important witness in behalf of Cummings, and that he was expected to be present but owing to having met

with an accident he was detained at Susitna, a place 175 miles distant from Seward and with which the only communication was by monthly mail service, and setting forth the substance of the testimony which Thompson would give if present. The motion for continuance was denied by the court (Record, p. 41), under section 169 of the Alaska code of civil procedure, upon the plaintiff's admitting that the evidence of Thompson, if present, would be given as set out in the affidavit; and on the basis of this admission the affidavit was read in evidence at the opening of the defense (Record, pp. 40, 27-30), as equivalent to Thompson's testimony, under the practice of the Alaska courts. This evidence, as well as the rest of that produced at the trial, will be summarized in the course of our argument, so far as pertinent to the points under discussion.

While the cause stood continued to the Valdez term for the submission of the written arguments, the court granted a motion of the defendants, based on a showing that the judgment at law on which this suit is based had been assigned by the original plaintiff, Meredith, to J. L. Reed, one of his attorneys in this suit, to substitute Mr. Reed as the plaintiff herein; and the judgment, when rendered, was entered in favor of J. L. Reed as the substituted plaintiff, and all the subsequent papers bear the amended title. (Record, pp. 115-18.)

The court below, on April 27, 1912, filed an opinion (Record, pp. 119-39) embodying its decision in favor of the plaintiff as to certain of the property embraced in the deed of conveyance from Thompson to Cummings, namely, those items of the property which the

court regarded as real estate, and denying the plaintiff equitable relief as to the rest of the property, which the court classed as personalty. Upon this "decision," findings of fact and conclusions of law prepared by the plaintiff were signed by the court on May 4th (Record, pp. 139-46) and on the same day judgment was entered in favor of the plaintiff (Record, pp. 146-9), adjudging that the deed from Thompson to Cummings "was made with intent to hinder, delay and defraud the creditors of the said Eri Thompson and is void as against the plaintiff's judgment" (at law) * * * * "and as against plaintiff in this action," that the plaintiff has a valid lien under said judgment and in this action upon the real property described in said deed, to-wit, the mining claim and the half interest in the saloon building and the parcel of land whereon it is situated, such lien dating from May 22, 1910, and that the record of the deed is cancelled in so far as it conflicts with the plaintiff's judgment and lien, and that the plaintiff may proceed with execution accordingly, and also rendering judgment against both defendants for the costs of this suit. From this judgment the defendants have joined in appealing, by their separate attorneys, to this court (Record, pp. 150-62).

The following is the text (Record, pp. 150-53), omitting formal parts, of the appellants'

ASSIGNMENT OF ERRORS.

1.

That the above-named District Court erred in over-

ruling the demurrer of said defendant Thompson to the amended complaint of the plaintiff in said cause.

2.

That said District Court erred in overruling the demurrer of said defendant J. M. Cummings to the amended complaint of the plaintiff in said cause.

3.

That said District Court erred in holding, on the trial of said cause and as set forth in its opinion and decision therein filed on April 27, 1912, in substance and effect that the burden of the evidence as to the *bona fides* of the sale in question in said cause was shifted from the plaintiff to the defendants.

4.

That said District Court erred in holding, in its said opinion and decision in said cause, that the original plaintiff therein had brought himself into privity with the real property in question in said cause, so as to have a standing in equity to maintain said action to set aside the transfer thereof for fraud against creditors.

5.

That said District Court erred in holding, in its opinion and decision in said cause, that the original plaintiff therein, before instituting said cause, had exhausted his remedy at law against said defendant Thompson for

the enforcement of said plaintiff's judgment at law against him.

6.

That said District Court erred in holding, in its said opinion and decision in said cause, that the mining claim in question was real estate and could therefore be reached in said cause in equity without an execution having been first levied thereon for the enforcement of said original plaintiff's judgment at law against said defendant Thompson.

7.

That said District Court erred in holding, in its said opinion and decision in said cause, that the saloon building and lot in question were real estate and could therefore be reached in said cause in equity without an execution having been first levied thereon for the enforcement of said original plaintiff's judgment at law against said defendant Thompson.

8.

That said District Court erred in finding, in its finding of fact No. VI set forth in its findings of fact and conclusions of law filed in said cause on the 4th day of May, 1912, in substance and effect that the conveyance therein mentioned was made with intent to defraud the creditors of said defendant Thompson.

9.

That said District Court erred in making its socalled

"conclusion of law" No. 1 set forth in its said findings of fact and conclusions of law.

10.

That said District Court erred in making its so-called "conclusion of law" No. 2 set forth in its said findings of fact and conclusions of law.

11.

That said District Court erred in making its conclusion of law No. 3 set forth in its said findings of fact and conclusions of law.

12.

That said District Court erred in making its socalled "conclusion of law" No. 4 set forth in its said findings of fact and conclusions of law.

13.

That said District Court erred in making its conclusion of law No. 5 set forth in its said findings of fact and conclusions of law.

14.

That said District Court erred in finding for the plaintiff in said cause on the issue of fraud.

15.

That said District Court erred in finding for the plaintiff in said cause on the issue of lack of consideration.

16.

That said District Court erred in rendering said judgment hereby appealed from, in favor of said plaintiff and against said defendants in said cause.

POINTS.

1.

The amended complaint shows on its face that the plaintiff had not exhausted his remedy at law before bringing this suit for equitable relief.

2.

The court below erred in laying upon the defendants the burden of affirmatively proving their good faith and an adequate consideration in the transaction between them, by holding that the deed was fraudulent by statute as to the personalty embraced, and that it was therefore presumptively fraudulent *in toto*.

3.

The burden of proof of fraud, resting properly on the plaintiff, is not sustained by the evidence; and even if it be held, as by the court below, that the burden was on the defendants to prove good faith, that fact is fully established by the evidence.

4.

Even if certain of the property conveyed was real estate, the plaintiff had not brought himself into privity therewith, and hence cannot maintain this suit.

5.

The court's first "conclusion of law" is a mere finding of fact and not of law, and is unwarranted by anything in the pleadings or proofs.

6.

The court's second "conclusion of law" is also a mere finding of fact, and foreign to the issue.

7.

The court's third "conclusion of law" is not sustained by anything in the facts found.

8.

The court's fourth "conclusion of law" is a mere finding of fact, and as such is not sustained by anything in the pleadings or proofs.

9.

The court's fifth conclusion of law is not sustained by the facts found, and the court erred in entering judgment accordingly.

ARGUMENT.

1.

The amended complaint shows on its face that the plaintiff had not exhausted his remedy at law before bringing this suit for equitable relief.

This point is urged in support of the first and sec-

ond assignments of error—the trial court's overruling the separate demurrers of these appellants to the amended complaint—and the fifth assignment of error—the court's holding that the plaintiff had exhausted his remedy at law prior to instituting this suit.

The law undoubtedly is,—and the trial judge so held as regards personalty,—that so long as a judgment debtor has property open to execution his judgment creditor cannot go into equity to satisfy his judgment out of assets which, as between the debtor and third parties, belong to the latter.

Now, the amended complaint shows (par. VII—Record, p. 5) that the Susitna saloon business, its stock of liquors and licenses,—or rather the half-interest therein that was included in Thompson's conveyance to Cummings of October 1909,—were reconveyed by Cummings to Thompson in February 1910, prior to the plaintiff's judgment at law, and stood in Thompson's name when this equity suit was begun (October 1910), but had been mortgaged by him in the interval to one Murphy for $1,100. This shows that, notwithstanding the marshal's formal returns of *nulla bona* on the original and alias executions, there *were* seizable chattels in Thompson's hands which were not seized in execution. It is true that an officer's return on a writ may not be collaterally questioned; but one seeking a remedy which depends on a fact so certified may admit away that fact in his pleading, and this the plaintiff did by the showing made in paragraph VII of his amended complaint.

The appellee may point to the provision of section

317 of the Alaska civil code, that "personal property mortgaged may be taken on attachment or execution issued at the action of a creditor of the mortgagor, but before the property is taken the officer must pay to the mortgagee * * * * the amount of the mortgage debt," etc.; and he may contend that he was not bound to exhaust his remedy against this mortgaged personalty when recourse to it was coupled with such burdensome conditions, before suing in equity to reach other property. But, first, this statute plainly gives recourse at law to incumbered chattels, and the fact that such recourse is conditioned upon the execution creditor's first discharging the mortgage debt does not make it the less a "remedy at law;" secondly, the *title* to mortgaged property rests in the mortgagor, the mortgagee having neither legal nor equitable estate therein, but a mere lien thereon; and, lastly, the appellee alleged, in the same paragraph of his complaint in which he acknowledged that Thompson had become repossessed of this personalty, that the mortgage of it to Murphy was made in fraud of his judgment. This allegation, to be sure, was made against the validity of Murphy's mortgage lien, and Murphy is a stranger to this suit, could not contest this averment, and is not bound by it; but as between the appellee and Cummings this assertion may be taken as true—Cummings has the benefit of it. Therefore, according to the appellee, the saloon chattels were not burdened with a mortgage valid as against him, and he was not bound to tender the mortgage debt, but could levy in defiance of the apparent lien.

See Safe-Deposit & Trust Co. v. City of Anniston, 96 Fed. 661.

Lee v. Harback, 2 Ohio Dec. (Reprint) 361.

2.

The court below erred in laying upon the defendants the burden of affirmatively proving their good faith and an adequate consideration in the transaction between them, by holding that the deed was fraudulent by statute as to the personalty embraced, and that it was therefore presumptively fraudulent in toto.

This point is urged in support of the third assignment of error—the trial judge's holding that by reason of the non-transfer of possession of the personalty pursuant to the conveyance, the burden of proof of *bona fides* of the conveyance as respects *all* the property embraced therein shifted, and devolved upon the defendants.

The trial judge in his opinion (Record, pp. 127-8) cited section 1043 of the Alaska code of civil procedure, —"Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed *prima facie* to be a fraud against the creditors of the vendor or assignor * * * during the time such property remains in the possession of said vendor or assignor,"—and drew therefrom the inference (p. 129) that "While * * the fraud presumed from want of change in possession is confined to personal property, yet in this case, where both real and personal property were trans-

ferred by one instrument, which property constituted the entire estate of the debtor, and there was no actual change of possession of any of the property until long subsequent, this taken in connection with the various circumstances above pointed out *is sufficient to shift the burden of evidence as to the bona fides of the sale from the plaintiff to the defendants.*"

Herein lies a fundamental error of the court below —or rather two errors, one of fact and one of law; errors which, if we shall satisfy this court that they are such, must deprive the trial court's weighing of the testimony of the presumption of correctness which would otherwise attend it when under appellate review.

First, the trial judge erred in point of fact, in concluding that there was no "immediate delivery and actual and continued change of possession" of the personal property, accompanying the instrument of transfer.

In whom did the actual, physical possession of the personal property rest, immediately prior to the execution of the conveyance? Not in Thompson, for he was in Valdez, nearly four hundred miles from Susitna; but in Price, his partner in the ownership of the Susitna saloon stock, licenses and business. The possession of Price, as co-owner and copartner,—agent, therefore, of the other co-owner and copartner,—was the possession of Thompson so long as the latter remained his copartner, but no longer; on the instant that Thompson, by conveying to Cummings, ceased to be Price's co-owner and copartner, Price's actual possession became referable to his new co-owner, Cummings, *quoad* Cum-

mings's undivided share. The personal property no longer "remained" in Thompson's possession—a merely constructive possession theretofore; it shifted immediately, automatically, to Cummings upon the transfer of the title.

These principles are elementary, and characterize the facts beyond dispute. Neither Thompson nor his vendee Cummings would have any right to take the actual possession away from the co-owner Price, with a view to its delivery in consummation of the sale; but the law shifted the constructive possession with the title.

Secondly, the trial judge erred in clothing the *constructive* fraud stamped by the statute upon a transfer of title to personalty, without concomitant transfer of possession, with the power of tainting, as presumptively fraudulent *in fact,* the transfer by the same instrument of title to realty—which need not be accompanied by transfer of possession.

For this is to lose sight of the inherent distinction between constructive and actual fraud. The former is a character stamped by the policy of the law upon specified acts not done in a prescribed manner and form, no matter how innocent in intent and essence these acts may be; the latter necessarily involves moral obliquity—cannot exist in its absence. Constructive fraud is the creature of positive law—*malum prohibitum;* fraud in fact has its root in ethics. No constructive fraud is grafted by statute upon a transfer of title to realty without livery of seizin; and to hold that because the same instrument also transfers the title to personalty in a manner—i. e., unaccompanied by

transfer of its possession—declared by a statute to be (irrespective of actual intent or motive) a fraud against the vendor's creditors, therefore the transfer of the realty is *prima facie* fraudulent, is to impute moral delinquency where its non-existence is entirely consistent with the transaction, and to ignore other statutory provisions (sections 98, 130, Alaska civil code) which deal adequately with the transfer of realty, both as to formal requirements and as to the motive involved.

This misconstruction of the statute deprives the trial judge's conclusions from the testimony, as we have said, of the weight which such conclusions ordinarily carry on an appeal. We do not lose sight of the unusual rule of appellate courts that they will not disturb a trial judge's conclusions of fact if there is testimony to sustain them, even though the appellate judges may regard the preponderance of the testimony as leaning against the facts found. But this trial judge was weighing the testimony to determine whether it exculpated the appellants from guilt (intent fraudulent in fact) with which he erroneously held them *prima facie* chargeable; not to determine (as he ought to have done) whether the preponderance of testimony fastened upon them that guilt, of which they stood *prima facie* free. He has nowhere found that the evidence affirmatively fixes upon them actual fraud; but merely that it does not affirmatively show them innocent of actual fraud. But innocence of actual fraud was properly to be presumed in their favor; and the trial judge ignored or rather reversed that presump-

tion under the influence of a construction of a statute which, as we have argued, was unwarranted.

This court, therefore, can and should approach the consideration of the testimony unhampered by a presumption that the trial judge's inferences therefrom must have been correct; approach it, that is, as upon a trial *de novo* of the question of fact at issue,—actual fraud on the part of the appellants, or their innocence thereof,—and with the presumption in favor of their innocence.

3.

The burden of proof of fraud, resting properly on the plaintiff, is not sustained by the evidence; and even if it be held, as by the court below, that the burden was on the defendants to prove good faith, that fact is fully established by the evidence.

This point is urged in support of the eighth, eleventh, fourteenth and fifteenth assignments of error; the questions of actuality and sufficiency of consideration being discussed hereunder, as intimately connected with that of fraud.

The recovery of the appellee's judgment, the executions thereon, the making and delivery and subsequent recording of the deed of transfer (plaintiff's Exhibit B and defendants' Exhibit 1—Record, pp. 98-100, 112-15), the resale by Cummings to Thompson of the saloon personalty and business, are all admitted facts. The sole material issues are as to the consideration for and the good faith of the transfer to Cummings.

(1) Thompson constructively testified (the plain-

tiff's admission under the statute, in order to defeat Cummings's application for a continuance on account of Thompson's absence, that if present he would testify as set forth in the affidavit for continuance, being equivalent to such testimony) that he sold the property to Cummings for $1,500, of which $500 was paid in cash and $1,000 by the cancellation of a debt of that amount theretofore owing by Thompson to him; and that the sale was subject to the outstanding debts of the saloon business. (Record, p. 28.)

Cummings in person testified, at the trial, that he paid for the whole property transferred to him $1,500. "I paid $500 in cash and I gave a note I had of him for a thousand dollars that he owed me. * * * He owed it to me for the business he bought me out of, in Katalla—half interest of the business I owned in Katalla." In 1907 "I sold him the half interest I owned, stock and fixtures, for $2,000"—a note for half, and cash half. (Record, pp. 42-3.)

CROSS EXAMINATION: There wasn't anybody present when I paid Thompson the $500; we went up to Thompson's room in the hotel—in the Seattle Hotel (at Valdez). I paid him in currency, paper money, $500, and gave him the note at the same time. That note was dated at Katalla; I never was in partnership with him there; it was in the summer of 1907 that I sold out to him in Katalla—some time the last of August. Then I went below, went to Seattle; I think I remained out until the spring of 1909. The note was payable one year after date, without interest. There never had been any payments made on it; it

was a little more than a year past due when he paid me. He wrote me if I didn't need the money he would like to get more time on it, when it was due. I never knew anything about his money matters. (Record, pp. 49-50.)

This is all of the evidence touching the payment of the consideration. There was no attempt at contradiction. But the appellee argues against this evidence on the ground of improbability. Such a criticism has no substantial basis. Miners and saloon men in Alaska do comparatively little business by means of bank checks; it is their habit to carry considerable sums of money about the person; Cummings was on a prolonged stay at Valdez, in attendance on the court as a grand-juryman (Record, p. 47), and it was not unnatural that he should have come from Seward, where he then lived, well provided with ready money. He testified (cross examination—Record, p. 68): "For quite a few years I have been in the habit when I went away to have a little money with me and pack it with me; I drew the money out of the bank (at Seward). I did not know what I might run up against there (at Valdez). You never can tell, away from home."

The methods of such men, in a frontier country, are not to be tested according to the more guarded style of business transactions in thickly settled communities of high commercial development. The plaintiff could readily have called witnesses and compelled the production of books from the bank at Seward, where the trial was had, in an effort to prove the falsity of Cummings's statement that on going to Valdez he had

drawn the money from the bank. The plaintiff did not venture to make this attempt; and it is respectfully submitted that the evidence produced must stand as sufficiently establishing the payment of the consideration, as claimed by the defense.

The testimony on this point is attacked as varying from the statement of consideration ($1.) in the deed, and from the averment in Thompson's answer of payment in "lawful money of the United States of America." Childish quibbles! The expression of a nominal consideration in a deed is of daily occurrence, and the real consideration is always open to proof. And the averment of the form of payment in Thompson's answer was couched by the pleader in stereotyped phrase, and could not conclude his co-defendant from testifying to the actual fact.

Stress is laid on the fact that the cancelled note for $1,000 was not produced by the defense. But it was presumably in the hands of Thompson (if not torn up by him when it was surrendered, as is most probable), who was not present at the trial, but lay disabled by an accident at Susitna, 175 miles distant. The plaintiff had successfully objected to a postponement of the trial until he could be present, and it does not lie with him now to insinuate falsity in the evidence of consideration because Thompson did not appear and produce his cancelled note.

As to the *adequacy* of the consideration, the trial judge in his opinion says (Record, p. 122), "that the property other than the mining claim was probably worth about $1,500; the mining claim had a purely

speculative value impossible to fix." Considering that Cummings in his purchase assumed a half share of saloon indebtedness amounting to about $1,800, it must be concluded that Thompson received a full equivalent for his mining claim as well as everything else. What is more, the court's findings of fact (Record, pp. 140-43) embrace no finding that there was no valuable consideration. The statement to that effect found in conclusion of law No. III (p. 144) must be disregarded, as absence of consideration is matter of fact to be found, not of law to be applied.

(2) As to the *bona fides*: The trial judge's opinion mentions (Record, pp. 129-30) a number of circumstances of the transaction between the appellants as amounting to "badges of fraud." Little comment upon these circumstances will be required to show their entire consistency with the good faith of the parties, and especially the vendee; and it should be borne in mind that the trial judge, misplacing the burden of proof as shown above, did not declare that these circumstances made out an affirmative showing of fraud, but merely that they showed the defendants unable to discharge the burden thus wrongly laid upon them.

"Close and intimate relations existing between the parties to the transaction claimed to be fraudulent."

The only showing of any such relations is found in Cummings's testimony (p. 49) that he never was in partnership wth Thompson at Katalla, but away back in 1903-4 had been in partnership with him on Kayak Island. Truly a weighty circumstance to cast suspicion on a deal between them in 1909!

"Suit pending against the grantor approximately for an amount equal to the value of the property."

Cummings's knowledge of that suit is not a badge of fraud, but rather the contrary; for Thompson believed, and so assured him, that he was not liable and the suit could not prevail (pp. 29, 67). Moreover, Cummings was himself a creditor of Thompson for $1,000, and could exercise his undoubted right of preference by taking his property for the debt even though he knew of the suit and anticipated a possible result adverse to Thompson, so long as the cancellation of the debt and the money paid amounted to an adequate consideration for the property taken over.

"Insolvency of the grantor—the value of all his property was at the time of transfer about $1,500; his debts known to grantee other than that involved in the pending suit amounted to $2,800."

But of this $2,800, $1,000 was owing to Cummings and was cancelled as part of the consideration for the sale; and the remaining $1,800 was saloon indebtedness, which Cummings assumed as part of the transaction (pp. 53, 77).

"Unusual delay in recording conveyance."

It appears that the recorder at Susitna, who drew and acknowledged the deed while at Valdez, shortly afterwards went thence to the states, and did not return to his post at Susitna until the following February (pp. 36-7); that Cummings, although he knew of his passing through Seward when returning from the states, did not happen to think of handing him the deed for record (pp. 78-9); that the winter mail service

to Susitna, an interior point above the head of Cook Inlet, was very infrequent and uncertain; and that in the course of the spring Cummings sent the deed for record from Knik to Susitna by one Beede. It is submitted that Cummings's carelessness and dilatoriness about recording the deed, while reflecting on his business methods, argue for rather than against his good faith and innocence of purpose (p. 65). Had there been combination with Thompson in fraud of his creditors, the deed would surely have been dispatched for record to Susitna immediately upon its execution, months before the pending suit could come to trial.

"A sale of all his property of mixed character to one grantee."

Sufficient and proper motive for such a general disposal of his Alaskan interests is shown by Thompson's statement to Cummings (p. 66) that he was not coming back if he could get into business down there (in the states) in a saloon (pp. 66, 74); coupled with the fact that his wife came on from Susitna and went outside at about the same time (p. 66). Besides, the vendor's sale of all his property argues no fraudulent intent on the part of the vendee, who is not shown to have had knowledge or notice that Thompson had no other property.

"That at the time of purchase the property was unknown to the grantee." And "that it was bought without an attempt to examine, or request by the grantee for time to examine."

To one familiar with the "magnificent distances" of Alaska, and the means of traversing them, these "badges

of fraud" seem far-fetched. A creditor of Thompson for $1,000 more than a year overdue, while tied up on grand jury service in court at Valdez (p. 79), finds that he can realize his debt by purchasing, for its cancellation and $500 cash, Thompson's Alaska holdings, comprising a saloon interest and a roadhouse in dead-and-alive Susitna (p. 52) and a hitherto unprofitable mining claim far beyond. It must be now or never, as Thompson is bound for the states to seek business opportunities there (pp. 45, 47, 66, 74). Instead of demanding time for examination of the properties, throwing up his grand jury job, and voyaging some 400 miles to Susitna, thence "mushing" on foot 100 miles farther to the mining claim, already covered with snow, in the edge of winter, he makes such inquiries of others as he can (pp. 51, 53, 68), trusts the word of Thompson, whom he has known for some years and has never known to "beat anybody" (p. 73), and closes the deal. *Guilty!*

"That grantee did not take possession," etc. And "that the grantee did not exhibit ordinary interest in or attention to it after the transfer."

What has been last said is also sufficient explanation of Cummings's not going to Susitna that winter, but leaving Price, the saloon partner, in possession for him. Before spring Thompson returned, and repurchased the saloon business, becoming lessee of the saloon building; and for the following season Cummings leased the mining claim on royalty (pp. 53-4, 60), hence he had no occasion to visit it. Thompson's vaguely proved protests against intrusion upon the attendant water-

right, made the following summer, are shown not to have been known to or authorized by Cummings (pp. 62, 75-6), and cannot affect him.

"That the instrument of transfer was left with or delivered to the grantor."

There is not a scintilla of evidence in the record to sustain this statement, or to lead one to suspect such a fact.

"That it was hurriedly recorded by the grantor at an unusual time, to-wit, 8:30 Sunday night."

The deed was sent for record by the grantee through Beede as his messenger (pp. 62, 79), who on arriving at Susitna on a Sunday evening, happening to meet the grantor, sent it to the record office by his hand (p. 28). A mail arriving several hours later on the same evening brought the transcript of the plaintiff's judgment at law, which was recorded shortly before midnight. If the time was unusual for the deed, *a fortiori* for the judgment. To find anything irregular about this recording is to impute perjury as well as official dereliction to the disinterested witness Farris, the recorder.

"That no vouchers or documentary evidence of any kind to support the transaction are introduced or offered."

But, as we have shown, it was up to the plaintiff to overthrow the transaction, not to the defendants to "support" it. Besides, Alaskan miners cannot be expected to preserve either letters or cancelled notes for two years and more, especially when conscious of no wrongdong.

"That so few of the acts of the parties to the trans-

action were done in the ordinary manner."

Too vague to be susceptible of contradiction; and too hypercritical of the careless fashion of many "deals" on the frontier.

"That without an examination of the property the grantee sold back to the grantor the saloon for $400, which grantor was immediately able to mortgage for $1,100."

The mortgage to one Murphy in July 1910 is so long subsequent to and entirely distinct from the sale to Cummings here assailed, that no inference whatever can properly be drawn from the one touching the good faith of the other; nor can fraud be imputed to the debtor's repurchase in February, in his own name, of a part of the property sold by him in the preceding October. But lest the amounts here mentioned in comparison should give an unfavorable impression, it is as well to point out that the $400 which Thompson paid Cummings on the repurchase is precisely the net value of the half interest in the saloon stock and business, in excess of half the current indebtedness, as of the time of the original sale (pp. 52-3, 55, 67), so that the repurchase simply amounted to a cancellation *pro tanto* of the original sale as of its date, thus obviating all occasion for an accounting as to the business during the interval; and that the half interest thus repurchased, gross value $1,300, might not improbably be mortgageable the following July for $1,100 (the amount required to pay the annual liquor and tobacco licenses, due in July), notwithstanding teh existence of the current business

indebtedness—that not being a specific lien on the stock.

The law of fraudulent conveyances is so familiar that any discussion of it would be superfluous. Each case must stand on its own facts, and it will be enough to cite, without comment, a few of the decisions deemed most applicable to the facts disclosed by this record. The testimony of Cummings, under prolonged and rigid cross examination, while it shows him to have been a man of little education, unfamiliar with businesslike methods of dealing, bears throughout the stamp of truthfulness. His delay in forwarding his deed for record shows that, far from combining with Thompson to beat his creditors, he had no knowledge or suspicion of any fraudulent intent on Thompson's part. Thompson's innocence is equally evident, for had he planned to defraud his creditors he would not have returned to Alaska, repurchased the saloon stock, and resumed business; and had his mortgage to Murphy (which, indeed, as shown above, has nothing to do with this case) been made to evade payment of the plaintiff's judgment, it would not have been deferred until July 1910, long after the transcript of the judgment had reached Susitna. The transaction between the appellants stands, on the whole evidence, untainted by fraud of either party, as a purchase by Cummings made upon actual and adequate consideration, in the exercise of his lawful right to obtain satisfaction for his own claim, and without any reason to anticipate that Thompson would become subjected, by the success of the plaintiff's action at law, to any liability in addition to his current

business indebtedness, which Cummngs assumed. The purchase, therefore, cannot be successfuly assailed.

Rule v. Bolles, 27 Or. 368; 41 Pac. 691, 693.

Jones on Evidence (2nd Ed.), p. 233.

Wheaton v. Sexton's Lessee, 4 Wheat. (U. S.) 503; 4 L. Ed. 626, 627.

Johnson v. McGrew, 11 Ia. 151; 77 Am. Dec. 137.

Bamberger v. Schoolfield, 106 U. S. 149; 40 L. Ed. 374, 379-80.

Crawford v. Neal, 144 U. S. 596; 36 L. Ed. 522, 556-7.

Shelly v. Booth, 39 Am. Dec. 481.

Ruhl v. Phillips, 48 N. Y. 125; 8 Am. Rep. 522.

Jones v. Simpson, 116 U. S. 610; 29 L. Ed. 742, 744.

Prewit v. Wilson, 103 U. S. 24; 26 L. Ed. 363.

Parker v. Conner, 93 N. Y. 118.

Coolidge v. Heneky, 11 Or. 327; 8 Pac. 281, 282 *ad fin.*

Stewart v. English, 6 Ind. 176.

4.

Even if certain of the property conveyed was real estate, the plaintiff had not brought himself into privity therewith, and hence cannot maintain this suit.

This point is urged in support of the sixth, seventh and fourth assignments of error.

We are unable to see why the trial judge, while holding the roadhouse buildings to be personalty, held the saloon building to be real estate. All these buildings being in Susitna, a small unincorporated settlement on the public domain, are presumably mere squatters' improvements, ranking as personal estate. As to the mining clam, it is true that many authorities have pronounced possessory right under a mining location, while the claim remains unpatented, an interest in real estate; but the supreme court of Oregon, the state from which Alaska derives its legal system, holds the contrary.

Herron v. Eagle Mining Co., 61 Pac. 417.

See Phoenix M. & M. Co. v. Scott, 54 Pac. (Wash.) 777.

If the whole contents of the deed were personalty, then a seizure by execution levy was a prerequisite to this suit, as the trial judge has held. But even if the saloon building and the mining claim were properly classed as real estate, we respectfully submit that (notwithstanding the trial judge's destructive criticism, in his opinion, of the cases cited below) either the title must rest in the judgment debtor or the judgment at law must have been made a lien by levy, in order to support a suit to set aside a transfer as fraudulent toward creditors.

Wells v. Dalrymple, Fed. Cas. No. 17392.

In Re Estes, 3 Fed. 134.

Miller v. Sherry, 69 U. S. 237; 17 L. Ed. 287.

Smith v. Ingles, 2 Or. 43.

In this case, Thompson's deed of transfer to Cummings having been filed for record previously to the transcript of the plaintiff's judgment at law, the latter did not become a lien; and no levy was made. Hence the complaint failed to show either of the alternative prerequisites to equitable relief. The distinction pointed out by the trial judge between this case and *Arnett v. Coffey,* 27 Pac. (Col.) 614, is not real but merely apparent, and that case also is applicable.

5—9.

The court's first "conclusion of law" is a mere finding of fact and not of law, and is unwarranted by anything in the pleadings or proofs.

The court's second "conclusion of law" is also a mere finding of fact, and foreign to the issue.

The court's third "conclusion of law" is not sustained by anything in the facts found.

The court's fourth "conclusion of law" is a mere finding of fact, and as such is not sustained by anything in the pleadings or proofs.

The court's fifth conclusion of law is not sustained by the facts found, and the court erred in entering judgment accordingly.

These points (urged in support of assignments of error 9-13) may be argued together; they go not,

like those thus far presented, to the merits of the case, but to the formal sufficiency of the record to sustain the decree appealed from. Findings of fact must be such as to support the conclusions of law, and conclusions of law must be such as to justify the decree entered thereon. Neither the one nor the other are here sufficient to those ends. In each, matters of fact and matters of law are hopelessly intermingled. If Thompson's fraudulent intent declared in finding of fact No. VI is properly a matter of fact and not of law, then the same intent declared in conclusion of law No. III is not a matter of law, and has no place there. As pointed out above, there is no finding of fact of an absence of consideration. And nowhere, either in the findings or in the conclusions, is fraudulent intent on Cummings's part, or his knowledge of and participation in Thompson's fraudulent intent, found, either as matter of fact or as matter of law; nor is it found in the decree. This is fatal; and whatever may be this court's views as to the correctness of the decree as against Thompson, it should be reversed as to Cummings.

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THOMAS R. SHEPARD,
Attorney for Appellant Cummings.

In the United States Circuit Court of Appeals for the Ninth Circuit

ERI THOMPSON and
J. M. CUMMINGS,
Appellants,
v.
J. L. REED,
Appellee.

No. 2162.

Appeal from the United States District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

J. L. REED and
E. E. RITCHIE,
Attorneys for Appellee.

PROSPECTOR PRINT, VALDEZ, ALASKA

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Statement of the Case.

For convenience the parties will be designated as in the court below, appellants as defendants, appellee and his assignor as plaintiff. The record shows that plaintiff in the trial court, before judgment in this suit, assigned his interest in the cause of action to appellee. (R. 116.)

The statement of the case by counsel for defendants is accurate enough, but appears to plaintiff's counsel to be unnecessarily exhaustive. It is respectfully submitted that the following statement embraces all the vital facts involved:

Plaintiff in this suit had recovered judgment in an action at law against defendant Thompson for money earned by labor on a mining claim in which Thompson was interested, and had caused two executions to issue on said judgment, which had been returned unsatisfied. Prior to recovery of said judgment but long after the action was instituted Thompson gave a deed to defendant Cummings, whereby he purported to convey and transfer for the stated consideration of one dollar certain real and personal property which is admitted to have been all the real and personal property he then owned in Alaska.

Judgment was entered in the action against Thompson April 25, 1910, in the district court of Alaska, for $1,621.25 including costs. A transcript of the judgment was sent to the recorder of Cook Inlet precinct to be filed and recorded in order to make it a lien upon any real property Thompson might own in said precinct, as provided by statute. This was filed by the recorder Sunday, May 22, 1910, at 11:10 p. m.. The deed from Thompson to Cummings was filed the same day at 8:30 p. m. (See deposition of the recorder, H. S. Farris, R. 37.)

After return of the alias execution indorsed *nulla bona* plaintiff brought this creditor's suit to subject all of the property described in said deed from Thompson to Cummings to the lien of plaintiff's judgment against Thompson. In his amended complaint plaintiff set up his judgment and the return of executions wholly unsatisfied, alleged that the deed from Thompson to Cummings was without consideration and was made for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment aforesaid. Defendants answered separately, denying that the deed in question was made for the purpose of hindering, delaying and defrauding plaintiff in the collection of his judgment, and alleging the good faith of the transaction. The trial court found that the deed was fraudulent, and decreed that the real estate was subject to the lien by virtue of his judgment upon the personal property described in the deed because it had never been seized under process.

From the finding and decree against the validity of the deed defendants appeal.

Assignment of Errors.

Counsel for defendants present sixteen assignments of error in the proceedings of the trial court. In their brief, however, they base their argument upon an array of "points" with little attention to the assignments of error. Plaintiffs therefore, to conform their argument in logical sequence to that of defendants, will follow the "points" in order rather than the assignments of error.

Argument.

Point 1. "The amended complaint shows on its face that the plaintiff had not exhausted his remedy at law before bringing this suit for equitable relief." This contention is raised by the first, second and fifth assignments of error.

In support of this contention counsel cite the allegations in the amended complaint that Thompson, the judgment debtor, was still in possession of personal property which his deed to Cummings purported to transfer, that he was still the owner of it and had executed a chattel mortgage upon it to one Murphy, which mortgage was averred to be fraudulent. Counsel then argue "that so long as a judgment debtor has property open to execution his judgment creditor cannot go into equity to satisfy his judgment out of assets that as between the debtor and third parties belong to the latter."

This contention is disposed of by either of two answers:

First. The contention and counsel's argument are based upon the erroneous assumption that the amended complaint shows on its face that certain personal property was sold by Thompson to Cummings and then transferred back by Cummings to Thompson. The amended complaint contains no reference to a transfer back. It does allege two acts of Thompson concerning this property designed to hinder, delay and defraud plaintiff,—a fictititious sale and a sham mortgage. Both are alleged to be fraudulent and void as to plaintiff. Plaintiff nowhere admits either to be genuine. It is difficult to see how counsel deduce from the amended complaint the assumption that it shows on its face a reconveyance of the personal property, or any of it.

Second. Plaintiff submits that it is not an accurate statement of the law to say that a judgment creditor must "exhaust" legal remedies. A party is always entitled to go into equity in a case of equitable jurisdiction when he has no plain, speedy and adequate remedy at law. The latter phrase is invariably found in complaints asking for an injunction.

A judgment creditor can scarcely be held to have an available remedy at law when the only property claimed to belong to the debtor has been nominally transferred to a third party, and some of it mortgaged. In such case an action of some kind is necessary to subject the property to application on the judgment. It is not "open to execution" while the title is clouded by purported transfers and mortgages, even though fraudulent.

How have counsel pointed out that the judgment debtor in this case had property open to execution? They point to the stock of liquors and other chattels which made up the stock of the saloon business at Susitna in which Thompson had an intermittent interest according to his own statements and a constant interest according to plaintiff's contention and popular belief. The place was known all the time as the saloon of Thompson & Price, (Deposition of H. S. Farris, R. 36) and the liquor license was continued all the time in the name of Thompson & Price, (R. 33.) This property plaintiff alleged in his amended complaint was the property of Thompson until after this creditor's suit was brought, and purported to be under mortgage to Murphy.

Now what could plaintiff have done with this saloon property under execution levy? Counsel for defense explain: He could have recogniezd the mortgage and tendered the amount of it—$1,100—to the mortgagee and proceeded to sell the property on execution. Counsel admit that this would have been a "burdensome condition" but aver that it was still a legal remedy, and therefore should have been exhausted before recourse to equity was sought.

Does the law require an execution creditor to assume such burdens? In this case the stock was worth, according to the testimony of defendant Cummings, "twenty-five or twenty-six hundred dollars" with an indebtedness against it of "seventeen or eighteen hundred dollars." (R. 52-53.) So this is what plaintiff and the officer with the execution had to face. Thomp-

son's half interest was worth more than $1,300. It was covered with a purported mortgage for $1,100.

Counsel for defendants in their yearning to exhaust legal remedies offer plaintiff this pleasing requirement; that he pay Murphy $1,100 in cash and then sell the undivided one-half interest in this frontier saloon stock, valued for purposes of retail sale and wholesale barter at $1,300, for so much as it would bring at execution sale, and out of the proceeds pay the costs of the sale, recover the $1,100 paid to the mortgagee, and apply the surplus on his execution.

This was the legal remedy which counsel for defendants insist barred plaintiff's way to the court of equity until it was "exhausted."

Counsel also seriously observe that plaintiff alleges Murphy's mortgage to have been fraudulent. In that case, counsel assure the court, all plaintiff had to do was to levy on the stock and sell it as if no Murphy mortgage had ever been heard of. Counsel fail to advise us what view they would take of this "remedy" if in such case Murphy had seen fit to retake possession of the stock by writ of replevin. It is true that even then plaintiff would not have been remediless in the premises. He could have given a re-delivery bond in double the value of the property, re-taken possession and proceeded with it as he saw fit.

In recommending these "remedies" at law to plaintiff counsel for defendants overlook an additional burden. After getting rid of the questionable chattel mortgage by any means possible there remained an unsecured indebtedness on account of the saloon stock, against the

partnership owning it, an indebtedness of about three-fourths of its value. Now it is settled law that partnership debts must be paid out of partnership property before any of the partnership property can be taken for an individual debt of one of the partners. Plaintiff would have had to pay the partnership debts out of the property before he could have taken Thompson's half of the remnant on execution.

Does equity impose such hard conditions on a judgment creditor? Of what value is a money judgment for labor to a poor man if the debtor who, according to the judgment of a court is wthholding from him the wages of his toil, can by legal technicalities keep him out of the court of equity which could subject the debtor's property to payment of the judgment?

If the position of defendants' counsel is correct a judgment debtor owning a fortune in realty and a small amount of personalty might defeat collection of a judgment through equity, by making fraudulent conveyance of the realty and placing a chattel mortgage on the personal property for approximately its value. If he does that the creditor cannot proceed against the real property until he has paid the chattel mortgage and levied on and sold the personal property, even though he lose money by the transaction.

The statute requires that levy of an execution be made first on personal property of the debtor if any can be found subject to levy. This was the common law rule, based upon the theory that the debtor can better afford to lose his personal than his real property. But when the debtor himself asserts that he owns no chattels sub-

State of Washington,
County of King—ss.

THOMAS CHRISTIANSON, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and believes the same to be true.

THOMAS CHRISTIANSON.

SUBSCRIBED and sworn to before me this 24th day of April, 1911.

(Seal) ANNA RASDALE,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Complaint. Filed in the U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court of the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff.*
vs.
THE COUNTY OF KING, *Defendant.*
No. 1969.

AMENDED DEMURRER.

Comes now the defendant by protestation and not confessing or acknowledging any or all of the matters or things contained or alleged in plaintiff's complaint herein to be true, and reserving herewith the right of defendant to answer to each and all of the allegations so made by plaintiff in said complaint and to file the several defenses of this defendant thereto, the defendant herewith demurs to said complaint, and for a cause of demurrer to same shows:

1. That the plaintiff has no legal capacity to maintain this action.

2. That the said complaint does not state facts sufficient to constitute a cause of action against the defendant.

3. That said action has not been commenced within the time limited by law therefor.

4. That said complaint shows upon its face that the plaintiff has been guilty of laches and of procrastination in the bringing of said action.

5. That the Court has no jurisdiction over the person of defendant, or over the subject matter of said action.

6. That plaintiff's complaint shows that plaintiff by his own acts, deeds and omissions is now estopped from bringing and maintaining this action or from asserting any right, title or interest in and to the property described in said complaint.

JOHN F. MURPHY, and
ROBERT H. EVANS,
Solicitors for Defendant.

United States of America,
Western District of Washington—ss.

ROBERT H. EVANS, being first duly sworn, on oath deposes and says that he is one of the solicitors for the defendant above named; that he has read the foregoing demurrer, knows the contents of same, and believes that said demurrer to said complaint is well taken and is well founded in law, and herewith certifies upon his honor and belief that said demurrer to said complaint is well founded as aforesaid.

ROBERT H. EVANS.

Subscribed and sworn to before me this 17th day of May, 1911.

LOUIE T. SILVAIN,
Notary Public in and for the State of Washington, residing at Seattle.

United States of America,
Western District of Washington—ss.

DAVID McKENZIE, being first duly sworn, on oath deposes and says that he is Chairman of the Board of County

"There are two classes of cases where a creditor is permitted to come into equity for relief after he has obtained a judgment at law: The one class where his judgment or execution has given him a lien, but he is compelled to come into equity to have removed some obstruction or conveyance fraudulently or inequitably interposed which prevents or embarrasses a sale under execution; the other class where he comes into equity to obtain satisfaction of his debt out of property of the debtor which cannot be reached at law. In the latter case, as already shown, the relief depends on the creditor having exhausted his remedies at law by having execution issued and returned unsatisfied. In the former the creditor can come into equity to have the fraudulent obstruction removed as soon as he obtains a lien by judgment or execution, and is not obliged to show that he has exhausted his legal remedy of execution."

"It is sufficient, in a complaint in a suit by a judgment creditor to reach property alleged to have been conveyed in fraud of his rights, to state that an execution had been issued upon his judgment, and duly returned unsatisfied, without alleging the debtor's insolvency, or that he had no other property out of which the judgment could be made." Page v. Grant, 9 Ore. 116.

"When a judgment creditor has issued an execution and the sheriff has returned it unsatisfied, he has exhausted his legal remedy." Id.

A creditor's bill that alleges the issuance of an execution and its return *nulla bona* need not allege that the judgment debtor had no property out of which the

judgment can be satisfied. Wyatt v. Wyatt, 31 Ore. 531; 49 Pac. 855.

The sheriff's return of the execution unsatisfied is the best evidence of such failure of the remedy at law and cannot be controverted. Jones v. Green, 1 Wall. 330; McElwain v. Willis, 9 Wend. 559.

Other authorities to the same effect are Multnomah St. Ry. Co. v. Harris, 13 Ore. 198; Reed v. Loney, 61 Pac. 41 (Wash.); Schofield v. Ute Coal & Coke Co., 92 Fed. 269.

Brushing away technical quibbles the rule requiring the exhaustion of legal remedies before resorting to equity is this: If the debtor has tangible property, unincumbered, with title unquestioned, which is subject to seiure on execution the creditor must exhaust that property, personalty first, then realty, before resorting to equity. But he is not required to lift mortgage liens or contest the validity of fraudulent transfers and mortgages in his pursuit of legal remedies. The latter is an equitable suit in any case, so why not simplify the controversy by a single suit designed by long settled procedure for that purpose?

It is difficult to argue seriously the suggestion of defendants' counsel that a judgment creditor has not exhausted his legal remedies if he has failed to pay off a mortgage on personal property in possession of the debtor and admitted to belong to him, and levy an execution thereon. If the mortgage is stated to be $1,100 or more and the creditor owns about $11, how is he to pay the mortgage and proceed to the exhaustion of his legal remedy? He is certainly in a case to appre-

ciate the force of counsel's sympathetic admission that the condition is burdensome.

In this connection let it not be overlooked that while both defendants testify that Cummings sold back to Thompson the saloon stock and business within a short time after the deed was made and several months before it was recorded, no bill of sale indicating the transfer back was ever made or recorded and the evidence of Thompson's title rested on his possession and his mortgage to Murphy.

Second Point. "The court erred in laying upon the defendants the burden of affirmatively proving their good faith and an adequate consideration between them, by holding that the deed was fraudulent by statute as to the personalty embraced, and that it was therefore presumptively fraudulent in toto."

Plaintiff respectfully submits that the trial court did not "hold" as stated. What the court held was that the deed was constructively fraudulent as to the personalty it sought to transfer, under section 1043 of the Alaska statute, and that this fact in connection with the additional and weighty fact that the transaction in the course of its history embraced every badge of fraud known to the catalogue of such badges in the accepted law of fraudulent conveyances created a prima facie case in favor of plaintiff which shifted the burden to the defense. Here is what the trial judge said in his decision:

"While under section 1043, supra, the fraud presumed from want of change in possession is confined to personal property, yet in this case where both real and

personal property was transferred by one instrument, which property constituted the entire estate of the debtor and there was no actual change of possession of any of the property until long subsequent, this taken in connection with the various circumstances above pointed out is sufficient to shift the burden of evidence as to the bona fides of the sale from the plaintiff to the defendants. Many other circumstances may be mentioned of the class ordinarily denominated as of fraud." (R. 129.)

The decision then proceeds to enumerate fourteen of these badges of fraud.

In spite of the manifest attempt on the part of counsel to limit and qualfy the ruling of the court in holding that the plaintiff had established a prima facie case that the deed was made to hinder, delay and defraud plaintiff in the collection of his judgment, to the single fact that there had been no actual change of possession of any of the property conveyed, we submit that there were many other facts and circumstances before the court, some admitted by the pleadings and others offered in evidence, to which the court refers in its decision as "this taken in connection with the *various circumstances above pointed out,*" which justified the court and sustained his ruling in holding that the burden of proof had shifted to the defendants.

Facts Admitted by the Pleadings.

The pleadings admit that on the 25th day of April, 1910, plaintiff recovered a judgment against Eri Thompson and Dave Wallace, jointly and severally, in

the sum of $1,598.60 and costs. That on the first day of July, 1910, an execution was issued on said judgment which was returned unsatisfied. That on the 2nd day of September, 1910, an alias execution was issued and returned "that no property of said Eri Thompson could be found in the said Third division subject to execution and levy."

That Dave Wallace departed from the Territory of Alaska on or about the month of October, 1907, for the purpose of defrauding and defeating plaintiff in the collection of this judgment. That he has no property, real or personal, in the Territory of Alaska, out of which plaintiff could satisfy this judgment, and that the said Dave Wallace is insolvent.

The answer of defendant Eri Thompson admits that the mortgage and deed transferred *all* of the property, real and personal, of defendant Eri Thompson in the Territory of Alaska or elsewhere known to plaintiff and out of which he could satisfy his judgment herein, and that the said Eri Thompson *is insolvent.*

DOCUMENTARY EVIDENCE OFFERED BY PLAINTIFF.

1. Findings of Fact and Conclusions of Law in action No. 233 Thomas H. Meredith v. Dave Wallace and Eri Thompson, co-partners as Wallace and Thompson. (R. p. 106.)

2. Judgment in action No. 233. Dated April 25, 1910. Amount $1,598.60. Costs $32.65. Against Dave Wallace and Eri Thompson, co-partners, jointly and severally.

3. Execution issued July 1st, 1910, returned unsatisfied. Alias execution issued September 2nd, 1910, returned *"nulla bona."*

4. Quit claim deed. Dated 25th day of October, 1909, Eri Thompson, grantor, J. M. Cummings, grantee. Consideration, *One dollar.* Property conveyed, (R. p. 98.) Indorsed *"Filed May 22, 1910, at 8:30 p. m. request of Eri Thompson."*

5. Transcript of plaintiff's judgment. Indorsed "The within instrument was filed for record at *11:10 o'clock p. m. May 22, 1910,* and duly recorded on book III, Orders and Judgments, on page 1 of the records of said district." (R. p. 100, 101.)

6. License. It is admitted in evidence (R. p. 33) that barroom license No. 5771 was issued to Thompson and Frye for the year commencing May 20, 1909, and that the same was never transferred nor any application made for an order substituting Cummings for Thompson.

7. Chattel mortgage dated 14th day of July, 1910. Eri Thompson to W. Murphy. An undivided one-half interest in and to that certain stock of liquors and cigars now owned by Eri Thompson and Hugh Price, either in the saloon conducted by said Thompson and Price or in transit from Seattle or other cities to Susitna. Mortgaged as security for the payment of the sum of $1,100. No interest. No witnesses.

Depositions read on behalf of plaintiff. Deposition

of H. S. Farris. (R. p. 34, 35, 36 and 37.) Deposition of Hugh Price. (R. p. 38, 39 and 40.)

BURDEN OF PROOF. "As has already been noticed, presumptions arise that a conveyance is fraudulent on a showing of certain facts, such as that a conveyance by one indebted is voluntary, etc. These presumptions are, however, rebuttable presumptions, and their only effect is to *shift the burden of evidence* to the party against whom the presumption exists." 20 Cyc. 750.

"The burden of proof, where it is on the plaintiff, may be shifted to the defendant where plaintiff makes out a prima facie case of fraud." 20 Cyc. 759.

Fraud is never to be presumed when the transaction may be fairly reconciled with honesty, especially where it is alleged to have occurred many years before the bringing of suit, and hence the burden of proof, where not governed by statute, is on the attacking creditor to show fraud in the conveyance; but where facts appear which are sufficient to raise a presumption that the conveyance is in fraud of the *grantor's* creditors, the burden of showing good faith is shifted to the parties to such conveyance." 20 Cyc. 751.

CONSIDERATION. "The general rule is that a conveyance with a *consideration merely nominal* will be considered *voluntary* as against attacking creditors." 20 Cyc. 492. Thomson et al v. Crane et al 73 Fed. 327.

The Court said, "The deeds have been executed and delivered by the grantor to the grantees without any intent on his part to hinder, defraud or delay creditors of the grantor, it devolves upon the complainants to

show that they were creditors of the grantor at the time he executed the deeds. *A voluntary deed is fraudulent by operation of law,* where the facts and circumstances clearly show that existing creditors are thereby prejudiced, without regard to whether there was any actual or moral fraud in the conveyance."

SOLVENCY OF GRANTOR. "Although there are some decisions to the contrary, the general rule is that where a conveyance not purporting to be based upon a valuable consideration is attacked by a creditor, whose debt was in existence at the time of the transfer, the burden of proving that the transferrer retained sufficient means to pay existing creditors is on defendant. In other words the burden of proving solvency in such a case is on the party seeking to sustain the validity of the transfer. A fortiori if the complaint alleges a *conveyance of all the grantor's property* and the answer not only denies that fact, but also avers that after the delivery of the deed the grantor was seized of real estate, located in certain counties, abundantly sufficient to pay the claims of his creditors, the *burden of proof* rests on the defendant." 20 Cyc. 757.

"There are circumstances so frequently attending conveyances and transfers intended to hinder, delay and defraud creditors that they are denominated badges of fraud. These badges of fraud do not in themselves or *per se* constitute fraud, but are rather signs or indicia from which its existence may be properly *inferred* as matter of evidence. They are more or less strong or weak according to their own nature and the *number*

concurring in the case. They are as infinite in number and form as are the resources and versatility of human artifice." 20 Cyc. 440.

TRANSFER IN ANTICIPATION OF OR PENDING SUIT. "If a transfer is made by a debtor in anticipation of a suit against him, or after a suit has begun and while it is pending against him, this is a badge of fraud, but the pendency of a suit will not overturn a conveyance made in good faith and for value. If a conveyance is made pending suit against the grantor, for the purpose of preventing the collection of such a judgment as may be recovered, and with the *knowledge of the grantee* that is is so made, it will be set aside at the instance of the plaintiff in such suit after judgment for him therein. whether made with or without a valuable consideration." 20 Cyc. 444.

CONCEALMENT OF OR FAILURE TO RECORD CONVEYANCE. "The fact that a conveyance is withheld from record or is otherwise concealed is a badge of fraud. Failure to record a conveyance is, however, only a circumstance *to be considered in connection with other facts,* and is insufficient in and by itself to establish a fraudulent intent." 20 Cyc. 447.

SECRECY OR HASTE. "Secrecy is a badge of fraud; and so is undue or unusual haste a badge of fraud. Secrecy is a circumstance which may give force to other evidence and from which in connection with other facts fraud may be inferred." 20 Cyc. 448.

Insolvency or Indebtedness of Debtor. "Evidence of large indebtedness, or of complete insolvency, is an important element in marshaling badges of fraud to overturn fraudulent transfers, but mere indebtedness of the grantor at the time of making a conveyance is not generally of itself such evidence of fraud as will avoid a conveyance, although it is voluntary." 20 Cyc. 449.

Transfer of all the Debtor's Property. "The transfer of all or nearly all of his property by a debtor, *especially when he is insolvent* or greatly embarrassed financially, is a badge of fraud." 20 Cyc. 449.

Retention of Possession. The unexplained possession or retention by the grantor of the property transferred is a badge of fraud. 20 Cyc. 450.

Other Circumstances. "The fact that the transaction took place out of business hours or otherwise not in the usual course of business or not in the usual mode, the failure of the purchaser of goods to examine them etc. The fact that the *grantor* in the conveyance delivers the same to the recorder for the purpose of having such deed recorded, or that the grantor keeps his other property inaccessible to his creditors has each been held a circumstance indicating fraud." 20 Cyc. 451.

Repelling Badges of Fraud. "Where numerous signs or badges of fraud exist it is incumbent on the party seeking to uphold the transfer to meet and overcome them." 20 Cyc. 543.

In Mendenhall v. Elwert 36 Or. 375, the Court

of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances."

It was therefore entirely competent for the legislature to provide that the territory or one of its counties should be the ultimate heir of those dying intestate and without other heirs or kindred; and it was further competent for it to provide that the rights of the territory or the county should be determined by the Probate Court in the administration proceeding in the same manner and by the same procedure as the rights of any other claimant to the estate.

It is conceded that under section 340 of the Probate Act relating to the descent of real property, it would have been entirely competent for the Court to determine that there were no children or lineal descendants of the intestate under subdivision one, and to distribute the property to the father under subdivision two. It would likewise have been competent for that Court to determine that there was no father or lineal descendants under subdivisions one and two and to distribute it to the brothers and sisters under subdivision three. Its determination upon these questions after due notice and hearing, on well established principles, would be binding upon the whole world.

McGee v. Big Bend Land Co., 51 Wash. 406.
In re Ostlund's Estate, 57 Wash. 359.
Case of Broderick's Will, 21 Wall. 503.
Proctor v. Dicklow, 45 Pac. 86.

Why was it not equally competent for the Probate Court to determine that there were no kindred and to escheat the property to the county? In my opinion such was the legislative intent, and this view of the subject is strengthened by reference to subdivision seven of section 353, relating to the

distribution of personal property. It is there provided that if there be no husband, widow or kindred of the intestate, the personal estate shall escheat to the county and the administrator shall convey it to the county treasurer. The provision is not that the administrator shall convey it to the county treasurer, if not claimed by husband, widow or kindred, but that he shall convey it if there are none such, and the Probate Court was necessarily invested with jurisdiction to determine that question. This view is further strengthened by the fact that the provision of section 480 of the Civil Practice Act of 1854 (Laws '54, p. 218), authorizing the prosecuting attorney to file an information in the District Court for the recovery of property escheated or forfeited to the territory, was eliminated by the Civil Practice Act of 1863 (Laws '63, p. 192), and since 1863 there was no provision in the laws of either the territory or state, in relation to escheats, except those found in the Probate Practice Act, until the passage of the Act of 1907.

1 Rem. & Ball. Code, Sec. 1356, *et. seq.*

The latter act left the subject of escheats to be dealt with by the Court administering the estate as before, limiting only the time within which heirs must appear to claim the estate. The Probate Courts of the territory and the Superior Courts of the state have uniformly assumed jurisdiction in this class of cases, and the right of the state or county to appear in the probate proceeding and contest the rights of other claimants has been recognized by the highest court of the state.

In re Sullivan's Estate, 48 Wash. 631.

For these reasons I am of opinion that a valid title was vested in the county by the decree of the Probate Court and that the complaint states no cause of action. This view of the case renders it unnecessary to consider the question of adverse possession. If the complaint contains a defense on that ground it will at once be conceded that the pleading is very inartificially drawn with that object in view, but nevertheless it is difficult to escape the conclusion that the county has held the property adversely under color of title and claim of right far beyond the statutory period.

I have not overlooked the fact that the complaint avers that

amounts to notice, and is equivalent in contemplation of law, to actual knowledge, and makes the grantee a party to the wrong." Clements v. Moore, 6 Wall. 312.

Under the rule declared in Causler v. Cobb 77 N. C. 30 and approved by the Supreme Court of the state of Oregon in Weber v. Rothschild, 15 Or. 385, it was necessary for plaintiff to establish a prima facie case by showing that the deed in question had been executed to defraud plaintiff, a creditor of defendant, and upon such a showing the burden of proof shifted to the grantee (Cummings) to protect his title by showing affirmatively a valuable consideration and without notice of the fraudulent intent of the grantor.

In support of the point that plaintiff had established such a prima facie case the following facts were before the Court at the conclusion of plaintiff's evidence. That the deed of October 25, 1909, Eri Thompson, grantor, to J. M. Cummings, grantee, conveyed *all* the grantor's property, both real and personal. That the property conveyed was of a miscellaneous character, to-wit: A placer mining claim; a one-half interest in a saloon building and lot; a one-half interest in saloon fixtures, cigar and liquor licenses; a log-house (used as a road house) with fixtures and chattels; and a log cabin with chattels. The deed was executed pending suit against the grantor Eri Thompson for work and labor performed upon the same mining claim conveyed (Battle Axe claim) and judgment rendered April 25, 1910, against Dave Wallace and Eri Thompson, co-partners, jointly and severally in the sum of $1,598.80 and costs. (R. p.

91.) That two executions were issued on said judgment and both returned unsatisfied. (R. p. 92, 95.) That Dave Wallace departed the Territory of Alaska for the purpose of defrauding plaintiff in this action and is insolvent. That Eri Thompson is insolvent.

The consideration stated in the deed is one dollar. The law places a conveyance for a *nominal consideration* in the same class with *voluntary conveyances,* and proof of this fact is of itself sufficient, unsupported by any other circumstance indicating fraud, when attacked by a judgment creditor, to shift the burden of proof to defendants, and then the law requires of them to affirmatively show good faith and a valuable consideration.

The facts offered in evidence show that there was no actual change of possession of any of the property conveyed. It was admitted in evidence that barroom license No. 5771, issued to Thompson and Frye for the year commencing May 20, 1909, was never transferred to Cummings nor any application made for an order substituting Cummings for Thompson. (R. p. 33.) As to the conducting of the saloon business after October 25, 1909, Farris testified: "It was generally spoken of as Thompson & Price" (R. p. 36) and Price the former partner of Thompson testified in answer to the question "Did Cummings ever in person conduct the saloon business known as Thompson and Price at Susitna? If so, state when and for how long? Answer: No. (R. p. 37.) He further testified that he conducted the business without a change. (R. p 38.) That

he never had any accounting with Cummings (R. p. 39.)

Counsel assert that the actual possession of the personal property "automatically shifted" to Cummings after the execution of the deed. The sale of the license to sell intoxicating liquors did not automatically shift the license to Cummings, neither did the sale of a one-half interest in the saloon business automatically create him a partner with Price. Nor does the theory of "automatic shifting" of possession comply with the law.

WHAT CONSTITUTES CHANGE OF POSSESSION. "When property is susceptible of it, there must be an *actual, open and notorious change of possession, indicated by such outward and visible signs as give notice to all the world* that the title to all the property has passed to the vendee, and that the vendor's control over it has ceased." 20 Cyc. 541.

The grantor having by the same instrument conveyed all his property, both real and personal, upon proof of the fact that there had been no actual change of possession of the personalty as required under Section 1043 of the Alaska Code of Civil Procedure, "Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed *prima facie* to be fraud against the creditors of the vendor or assignor—during the time such property remains in the possession of said vendor." The presumption is created that it was the intent of the grantor Eri Thompson when he executed the deed, to hinder, delay and defraud the plaintiff as to

the personal property conveyed and the Court did not err in holding that a prima facie case of fraudulent intent had been established as to the conveyance as an entirety, especially in view of the fact that many other badges of fraud and suspicious circumstances were also in evidence.

The evidence shows that grantee failed to record deed for a period of almost seven months, from October 25, 1909, until May 22, 1910, and that then the deed was delivered by the *grantor, Eri Thompson,* to the recorder and at his request filed for record, after business hours, on Sunday at 8:30 o'clock of the night of May 22, 1910, two hours and forty minutes before the recorder filed for record plaintiff's transcript of judgment which had been sent to him by mail. (R. p. 100.)

Third Point. "The burden of proof of fraud, resting properly on the plaintiff, is not sustained by the evidence; and even if it be held, as by the court below, that the burden was on the defendants to prove good faith, that fact is fully established by the evidence."

Viewing the evidence as a whole, we submit that the number of badges of fraud and suspicious circumstances in connection with this case are far greater than those found in the famous Tyne case, decided in 1601, 1 Smith Lead. Cas. 1, from which most of our law relating to fraudulent conveyances is derived. As the number of badges of fraud increase the stronger becomes support of the conclusion that the sale was fraudulent. In attempting to prove facts entirely within their knowledge defendants failed to introduce *any documentary evidence* in support of a single transaction

at the time of and subsequent to the execution of the deed, although the testimony of Cummings describes many transactions of a kind in which documentary evidence is usually relied on by either one or both of the parties thereto.

As to the question of consideraton. The trial court saw J. M. Cummings on the witness stand and heard him testify and believed that his testimony as to consideration was false, and he likewise so concluded as to that of Eri Thompson. The question of consideration is necessarily vital when a conveyance is attacked as fraudulent. In the separate answer of J. M. Cummings he alleges "a valuable consideration of One Thousand Five Hundred Dollars *lawful money* of the United States of America." (R. p. 14.) The answer of Eri Thompson contains a similar allegation "for the sum of One Thousand Five Hundred Dollars *lawful money* of the United States of America, which sum was fully paid." (R. p. 18.) Cummings testified that *$500 was paid in currency* in Thompson's room in the hotel, that no other was present, and Thompson's note to him for $1,000, payable one year after date, without interest, was cancelled. That the note was past due more than a year. (R. p. 49 and 50.) Note not offered in evidence.

As to agreeing upon consideration and value of property Cummings testified "just taking Thompson's word about it and from information I had about the business over there." (R. p. 66.) Cummings says that he was at Susitna but once and that was in March, 1911, hence he had not seen any of the property conveyed. (R. p.

55.) Owing to the question of consideration being vital to the affirmative defense, the variance between the pleadings and the proof brings this case within the rule, "an incorrect statement of the consideration of a mortgage, deed of trust or other conveyance is a badge of fraud." 20 Cyc. 442. The difficult situation in which counsel for defendants find themselves in trying to give an appearance of plausibility and good faith to the testimony of their clients is forcibly illustrated by this argument near the bottom of page 23 of their brief:

"The plaintiff could readily have called witnesses and compelled the production of books from the bank at Seward, where the trial was had, in an effort to prove the falsity of Cummings's statement that on going to Valdez he had drawn money from the bank."

Plaintiff suggests that Cummings could "readily have compelled production of books from the bank." Cummings knew whether or not he had drawn the money as he stated under oath. The fact was peculiarly within his own knowledge. If he no longer had the cancelled check in his possession the bank records would have supported his sworn statement which he and his counsel preferred to leave unsupported in the record, when the bank could so "readily" have furnished conclusive corroboration. The production of this evidence was inferentially suggested by the court. The record, pp. 79-80, contains the following, the questions being put by the court.

Q. You say before you went over there (to Valdez from Seward) you drew $500 out of the bank here?

A. I drew out six or seven hundred, as I remember.

Q. Before you went over? A. Yes, sir.

Q. What bank were you banking with here?

A. The Bank of Seward.

Q. Will that show in your account with it.

A. I don't know.

It may be fairly inferred that this testimony and the failure of the defense to produce the books of the Bank of Seward did not strengthen the trial court's belief in the truth of Cummings's testimony.

It is worthy of attention that this alleged check for money drawn and the cancelled note for $1,000 had both been lost or destroyed.

Cummings testified that "I was taking a chance—most of my idea in buying an interest was to get into business" (R. p. 51 and 52.) He says that he left Valdez the latter part of November 1909 for Seward and remained there until April 5th, 1910, and went to Knik with George Palmer, and in answer to the question, "Did you engage in business with him there?" says, "I was working in the saloon for him, in the saloon, and my wife was running the roadhouse." Cummings says that he resold the one-half interest in the saloon business and licenses to Thompson in February, 1910, for $400 cash. (R. p. 54) and further testifies that when he sold back the liquor stock no papers passed between him and Thompson, that it was "just a verbal transaction." (R. p. 74.) Also, in answer to the question, "Were you ever in Susitna before you sold this property?" says, "Never had seen it, then; no, sir" It is dif-

ficult for even the imagination to give credence to the good faith of this transaction. It presents this anomaly, Cummings was selling a one-half interest in something that he had never seen, while Thompson had just returned to Seward, having been away from Alaska from November, 1909, to February, 1910. He could not have known what he was buying, because Price, who had been running the saloon in the interval, might have wrecked the business. In view of the fact that Susitna is 200 miles from Seward many things mght have happened without the knowledge of either the buyer or seller. Again, Cummings says there was no accounting made of the business during the winter. (R. p. 55.)

INADEQUACY OF CONSIDERATION. Wolf testified that about $4,000 was taken out of the mining cliam during 1907. (R. p. 81.) It is quite evident that Thompson knew this fact when he made the deed. Cummings says that he received in royalties, 25 per cent. of the yield. which was $465 in 1910 and $952.50 in 1911, (R. p. 60.) That he sold his interest in the saloon business for $400; that he sold the roadhouse for $800, $200 cash and balance in installments of $200 each six months; that he had secured rentals from his one-half interest in the saloon building amounting to $340.

Cummings says that he gave Joe Beedy, who is dead (R. 62), the deed together with the cost of recording and asked him to have it recorded. (R. p. 63.)' The recorder's indorsement on the deed shows that it was filed for record at the request of Eri Thompson.

From the relation of the parties to the property after it was conveyed can be gathered circumstances indi-

cative of the intent which controlled at the date of conveyance. Cummings never saw any of the property from October 25, 1909, to March, 1911, when he went to Susitna for the first time and remained theree but two or three days. He had never seen the mining claim at the date of the trial. (R. p. 53.) Al. Wolf testified that in February, 1910, he talked to Thompson at Seward as follows: "I spoke to him, trying to get a lay on the ground, as I didn't know for sure whether the Harper boys were coming, and he said he couldn't say a thing until the Harper boys came." When there was trouble between the Cache Creek Company and the lessee of the Battle Axe claim on Thunder creek during the summer of 1910, Thompson appeared on Thunder creek, having traveled one hundred miles, and Arthur Meloche testifies that he heard Thompson say that he had been over to see Morgan (the representative of the Cache Creek Company) "About this water affair." (R. p. 88.) Cummings says Thompson was never authorized to act as his agent at any time. (R. p. 62.)

It is plainly evident from Cummings's testimony that the details of the lease on the mining ground were arranged by some person other than himself, as he says, "Why, I signed the lay in Knik, the lease." Question. "And the arrangement was made there, was it, at Knik?" Answer. "No, I think it was made at the station (Susitna.) It was sent over to me to sign. I think that Harper had the papers made out over at the station and Harper sent them to me through the mail." The same is true with regard to the sale of the roadhouse.

He testifies, "I signed a contract and option to Mrs. Johnson."

Q. Where was that drawn up? A. At the station.

Q. By whom, do you know? A. I don't know.

Q. When was that sent to you?

A. I think in September.

These facts clearly indicate that Cummings did nothing more than carry out the bare formalities, while the other person (presumably Thompson) gave attention to the substance of the lease and contract of sale.

On Cummings's behalf it is urged that even though Thompson's intent was fraudulent he had no notice of such intent. He knew that suit was pending against Thompson (R. p. 66) and he knew that Thompson was conveying all his property. Further, Thompson and Cummings were represented throughout the trial of this case by the same attorney. If their defenses are incompatible this fact can only be reconciled upon the theory of fraud and collusion. These with many other facts above mentioned point to the conclusion that Cummings had more than constructive notice of Thompson's fraudulent intent.

Fourth Point. "Even if certain of the property conveyed was real estate, the plaintiff has not brought himself into privity therewith, and hence cannot maintain this suit."

This court disposed of the contention that a mining claim is not realty in the case of Eadie v. Chambers, 172 Fed. 79. The action was ejectment to recover possession of a half interest in a mining claim in Alaska, and for damages for the detention. It was brought un-

der Section 301 of the Alaska Code of Civil Procedure, which provides that "Any person who has a legal estate in real property and a present right to the possession thereof, may recover such possession, with damages. etc." Judgment for possession in that case was necessarily based upon the doctrine that a mining claim is real estate. The federal supreme court has laid down the same doctrine so often that citations can only weary this court.

The contention that plaintiff has not brought himself into privity with the real property conveyed is well answered by the following extract from the opinion of Sanburn, C. J. in Schofield v. Ute Coal and Coke Co. 92 Fed. 269.

"In the case at bar all the property which the judgment debtor has is real estate in La Plata county. The judgment is a lien upon all this property. The levy of an execution upon it could not make this lien more specific or more efficient, and the conclusion is irresistible that the general lien upon real estate created by entering a judgment or filing a transcript of it in the county where the lands of the debtor are situated in accordance with the statutes which provide therefor, is a sufficient basis for the maintenance of a suit in equity to remove a fraudulent obstruction to the enforcement of that lien." Bump, Fraud. Conv. 535; Black Judgm. Sec. 400.

Counsel for defendants refer feelingly to the "magnificent distances" of Alaska, and the difficulty of traversing them. This case also illustrates the magnificent stretches of time over which a judgment debtor in Alas-

ka can extend his evasion of payment of an adjudicated demand. As a means of discouraging debtors in like cases hereafter plaintiff respectfully suggests that this is an apt occasion for application of this court's rule designed for filibustering appeals.

Rule 30. Sec. 2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the judgment.

Exceptions to Conclusions of Law. Discussion of the points of brief for defendants numbered 5 to 9 inclusive, which points refer to alleged errors of the trial court in its conclusions of law, numbered as assignments of error 9 to 13 inclusive, appears to appellee's counsel to be needless. If it were admitted that the conclusions of law are all subject to the charge that they contain findings of fact, the objection is wholly artificial. Such defects, if any there be, are harmless error. The findings of fact are explicit and the judgment based on them clearly stated. Intermingling of facts with conclusions of law, if found, cannot vitiate a judgment sufficiently fortified by the facts and law of the case.

The remaining assignments of error are formal, and fully covered by the other assignments, and arguments dealing with them.

Counsel for appellee respectfully submit that the

record contains no error suggesting the possibility of prejudice to the defendants.

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Attorneys for Appellee.

No. [illegible]

United States Circuit Court of Appeals
for the Ninth Circuit.

THOMAS CHRISTIANSON,
Plaintiff in Error,

vs.

THE COUNTY OF KING,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

No.

THOMAS CHRISTIANSON,
Plaintiff in Error,

vs.

THE COUNTY OF KING,
Defendant in Error.

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

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In the District Court of the United States for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON,
Plaintiff in Error,
vs.
THE COUNTY OF KING,
Defendant in Error.

No. 1969.

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In the United States Circuit Court of the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff,*
vs.
THE COUNTY OF KING, *Defendant.*

No. 1969.

COMPLAINT.

And now comes the plaintiff and complains of the defendant as follows:

I.

That the plaintiff is a subject of the King of Norway.

II.

That the defendant is a municipal corporation, organized under the laws of the State of Washington, and is a citizen of the State of Washington.

III.

That the controversy in this action is between a subject of a foreign government and citizen of the State of Washington, and of the United States of America. That the matter in dispute and controversy in this action, exclusive of interest and costs, exceeds in value the sum of Three Hundred Thousand Dollars ($300,000).

IV.

That during the month of March, 1865, one, Lars Torgerson Crotnes, departed this life in the County of King in the Territory of Washington, intestate, and being at the time of his death a resident of the County of King. That at the time of his death, said Lars Torgerson Crotnes was commonly known in the neighborhood where he resided by the name of John Thompson.

V.

That prior to his death, said Lars Torgerson Crotnes had become the owner in fee under a chain of mesne conveyances

from the United States of America, of a certain tract or parcel of land, the title to which was conveyed to him under the name of John Thompson, which tract or parcel of land is located in the County of King and State of Washington, and more particularly described as follows, to-wit:

Beginning at a post on the right bank of Duwamish River, the same being the Southwest corner of the Original Donation Land Claim of Luther M. Collins, in Township 24 North of Range 4 East, in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 deg. 04′ east, 124 chains to the north line of said claim, so as not to enclose any of the improvements upon the east half of that portion of said claim deeded by said L. M. Collins to Joseph Williamson and William Greenfield, thence west along the north line of said claim, 20 chains and 67 links to a post, the same being the northwest corner of said claim; thence south along the west boundary of said claim, 82 chains to a post on the right bank of the Duwamish River, being the southeast corner of Eli B. Maple's land claim; thence along the meanderings of said river to the southwest corner of said land claim, the place of beginning, so as to contain 160 acres.

VI.

That said Lars Torgerson Crotnes died a bachelor, leaving him surviving as his heirs at law, two brothers, one sister, and the children of a deceased sister, all of whom were subjects of the King of Norway. That the plaintiff is a son of a sister of said Lars Torgerson Crotnes, and one of his heirs at law. That all the now living heirs at law of said Lars Torgerson Crotnes have by proper mesne conveyances, conveyed their right, title and interest in and to said lands above described to the plaintiff. That the plaintiff is now the sole owner in fee of said land.

VII.

That said Lars Torgerson Crotnes was born on or about the 30th day of August, 1829, in the City of Porsgrund, in the Kingdom of Norway. That the name of his father was Torger

Engebretson Crotnes, and the name of his mother was Cathrine Grotnes. That at the age of about 21 years he shipped as a sailor from said city of Porsgrund and went by way of England to Australia, and thence in the year 1856, to the City of San Francisco, California. That while in the harbor of said last named city he fled from the sailing vessel on which he was a sailor because of abuse and ill treatment. That he changed his name from Lars Torgerson Grotnes to John Thompson in order to conceal his identity, so that he could not be apprehended and brought back to the vessel from which he had fled. That he came to the neighborhood of Elliott Bay in said King County, and resided in the neighborhood of the same King County and Kitsap County, in said State of Washington, until the time of his death in 1865. That he acquired the land above described under the name of John Thompson.

VIII.

That the heirs at law of said Lars Torgerson Grotnes had no knowledge of what had become of him, and did not learn about his death and the place in which he died, nor of the fictitious name which he had assumed, until within three years last past. That since learning thereof, such heirs, and particularly the plaintiff, have been diligently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

IX.

That on the 26th day of March, 1865, one, Daniel Bagley, was duly appointed administrator of the estate of John Thompson, deceased, by the Probate Court of the County of King, in the Territory of Washington. That such proceedings were had in said estate in said Probate Court, that on the 26th day of May, 1869, a final decree of distribution was entered in said estate, in which it was recited that the administrator had on February 12, 1869, obtained an order of Court settling and allowing his final account, and recited that a time had been properly set for a hearing upon the entering of a decree of distribution in said estate and due and legal notice of such

hearing had been given, and after reciting the facts stated, said decree proceeded in the words and figures following to-wit:

"That said administrator had fully accounted to the Court for all of the said estate that has come into his hands and that the said estate, so far as discovered, has been fully administered and the residue thereof, consisting of property hereinafter mentioned, is ready for distribution; that all of the debts of the said deceased and of said estate and all the expenses of administration have been paid, and the said estate is in condition to be closed; that the decedent died intestate in the County of King, Territory of Washington, on the —— day of March, 1865, leaving no heirs surviving him; there being no heirs of the said deceased, that the entire estate escheats to the County of King, Territory of Washington.

Therefore, on this 26th day of May, 1869, no objections being made or filed, it is hereby ordered, adjudged and decreed that all of the acts of the said administrator as reported to this Court, and as appearing on the records thereof, be and the same are hereby approved and confirmed; that after deducting the estimated expenses of closing said estate, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter described, and now remaining in the hands of the said administrator, and any other property not now known or discovered, which may belong to the said estate or in which the said estate may have an interest, be and the same is hereby distributed as follows, to-wit:

The entire estate to the County of King, in Washington Territory.

The following is a particular description of the said residue of the said estate referred to in said decree and of which distribution is ordered, adjudged and decreed, to-wit:

160 acres of land on Duwamish River, more particularly described in a certain deed from Joseph Williamson and William Greenfield to Thompson dated January 19, 1865, and recorded in Volume 1 of Deeds, page 458 (and personal property).

Dated May 26, 1869.

THOMAS MERCER, Judge."

That said decree was null and void, and said Probate Court was wholly without jurisdiction to in any manner vest, transfer, convey, fix or pass upon the title to the land described in said decree, and had no power or authority to declare said land escheated, which is the same land as above described.

That all claims to said land by the defendant, and all acts done by the defendant in reference to said land, and all control exercised or attempted to be exercised by the defendant over said land, have been made, done, performed and exercised, under and by virtue of said null and void decree above described.

That the defendant has not, and never has had any contract, deed, conveyance, decree, judgment, nor other writing, record or document evidencing, or purporting to evidence any title on its part in or to said land.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having an escheat of said land adjudicated, adjudged or declared; nor has any other public authority or officer ever begun or instituted any such suit or legal proceeding.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature, before any court, officer or tribunal, for the purpose of having any title, or claim of title, which it had or might have in said land established, approved, confirmed or quieted; nor has any other public authority or officer ever begun or instituted any such suit or legal proceeding.

X.

That after the entry of said decree, the land above described was marked upon the assessor's roll as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof hereinafter described, which the defendant has assumed to convey to private parties by deed.

That about the year 1885, the County of King, in the then Territory of Washington, took possession of a certain portion of the tract of land above described, which said portion remained in its possession and after the organization of the State

of Washington, has remained in the possession of the defendant, and is generally known as the "King County Farm," and is more specifically described as follows:

Beginning at a post on the right bank of the Duwamish River, the same being the southeast corner of the Original Donation Land Claim of Luther M. Collins, in Township 24 North, Range 4 East in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 degrees and 4′ east, to the east bank of the Duwamish River; thence in a Southwesterly direction along the meanderings of said river to the place of beginning.

That the same has never been used for any county purposes, but has been let out to tenants for the purpose of being farmed and producing a monetary income for the county.

That about the year 1900, the defendant took possession of a portion of the tract of land first above described, which portion is known as the "King County Hospital Grounds," and is more specifically described as follows:

Beginning at the southeast corner of block 6, in King County Addition to the City of Seattle, thence along the southwest side of said block 6 to the southwest corner of said Block 6; thence south to the east bank of the Duwamish River; thence in a southerly direction along the east bank of said Duwamish River to the point of its intersection with the west line of Charleston Avenue; thence in a northeasterly direction along the west line of Charleston Avenue to the place of beginning.

That the defendant has placed upon the last described tract of land valuable improvements in the shape of a hospital building and its appurtenances, the exact value of which are to the plaintiff unknown, and since thus taking possession of the last described tract, has been and now is using the same for county hospital purposes.

That in the year 1892, the defendant assumed to make a plat of a certain portion of the tract of land first above described, and caused the same to be called the "King County Addition to the City of Seattle," and caused the same to be

recorded in the office of the Auditor of King County in Volume VIII of Plats on page 59.

That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County Addition, except such portion as is described as follows:

"Lots 1, 2, 3, 4, 8 and 9, in Block 5; Lots 5, 6, 7, 8, 9, in Block 7, which said Lots always have been and now are vacant and unoccupied, and Lots 20 and 21, in Block 7, which last two lots were unoccupied and vacant until within less than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income."

That in the year 1903, the defendant had assumed to make a plat of a certain portion of the tract of land first above described and caused the same to be called "King County 2nd Addition to the City of Seattle," and caused the same to be recorded in the office of the Auditor of said King County, in Volume II of Plats, on page 1. That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County 2nd Addition, except such portion as is described as follows:

Lots 1 to 9 both inclusive; Lots 13 to 16 both inclusive, and Lots 20 to 27 both inclusive, in Block 1; all of Blocks 2, 3 and 4; Lots 1 to 4 both inclusive; 8, 9, 12 to 16 both inclusive, and 21 to 25 both inclusive, all in Block 5; Lots 1 to 14 both inclusive, to 20 to 23 both inclusive, in Block 6; Lots 2, 6 to 9 both inclusive, and 18 to 20 both inclusive, all in Block 7; Lots 1 in Block 8; and Lots 2 to 5 both inclusive in Block 12, which said Lots always have been and now are vacant and unoccupied, and lots 10 to 12 both inclusive, and 17 to 19 both inclusive, all in Block 1, which 6 last described lots were unoccupied and vacant until within less than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income.

XI.

That the tracts of land hereinbefore described as the "King County Farm," "King County Hospital Grounds," "King County Addition to the City of Seattle" and "King County 2nd

Addition to the City of Seattle," together comprise the whole of the tract herein first above described as being the property belonging to Lars Torgerson Grotnes, except certain portions thereof which have been appropriated for public or quasi public purposes for railroad rights of way or highways.

XII.

That the plaintiff is entitled to recover from the defendant all of the buildings and improvements and tangible betterments which the defendant placed upon or attached to said land prior to the year 1903, but the plaintiff hereby expressly disclaims all right to any such buildings, improvements or tangible betterments, and hereby admits and consents that the defendant may retain the same, or be reimbursed for the same out of the said land at the present value of said buildings, improvements and tangible betterments.

WHEREFORE, the plaintiff prays that he may recover from the defendant the land hereinbefore described as the "King County Farm;" the land hereinbefore described as the "King County Hosiptal Grounds;" the land hereinbefore stated not to have been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County Addition to the City of Seattle," and the land hereinbefore stated not to have been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County 2nd Addition to the City of Seattle;" that the title of the plaintiff to said land may be quieted and confirmed; that the plaintiff may recover of the defendant the costs of this action and that the plaintiff may have such other and further relief as to the Court may seem meet.

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State of Washington,
County of King—ss.

THOMAS CHRISTIANSON, being first duly sworn, on oath deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing complaint, and knows the contents thereof, and believes the same to be true.

THOMAS CHRISTIANSON.

SUBSCRIBED and sworn to before me this 24th day of April, 1911.

(Seal) ANNA RASDALE,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Complaint. Filed in the U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court of the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff.*
vs.
THE COUNTY OF KING, *Defendant.*
No. 1969.

AMENDED DEMURRER.

Comes now the defendant by protestation and not confessing or acknowledging any or all of the matters or things contained or alleged in plaintiff's complaint herein to be true, and reserving herewith the right of defendant to answer to each and all of the allegations so made by plaintiff in said complaint and to file the several defenses of this defendant thereto, the defendant herewith demurs to said complaint, and for a cause of demurrer to same shows:

1. That the plaintiff has no legal capacity to maintain this action.

2. That the said complaint does not state facts sufficient to constitute a cause of action against the defendant.

3. That said action has not been commenced within the time limited by law therefor.

4. That said complaint shows upon its face that the plaintiff has been guilty of laches and of procrastination in the bringing of said action.

5. That the Court has no jurisdiction over the person of defendant, or over the subject matter of said action.

6. That plaintiff's complaint shows that plaintiff by his own acts, deeds and omissions is now estopped from bringing and maintaining this action or from asserting any right, title or interest in and to the property described in said complaint.

JOHN F. MURPHY, and
ROBERT H. EVANS,
Solicitors for Defendant.

United States of America,
Western District of Washington—ss.

ROBERT H. EVANS, being first duly sworn, on oath deposes and says that he is one of the solicitors for the defendant above named; that he has read the foregoing demurrer, knows the contents of same, and believes that said demurrer to said complaint is well taken and is well founded in law, and herewith certifies upon his honor and belief that said demurrer to said complaint is well founded as aforesaid.

ROBERT H. EVANS.

Subscribed and sworn to before me this 17th day of May, 1911.

LOUIE T. SILVAIN,
Notary Public in and for the State of Washington, residing at Seattle.

United States of America,
Western District of Washington—ss.

DAVID McKENZIE, being first duly sworn, on oath deposes and says that he is Chairman of the Board of County

Commissioners of the defendant King County; that he has read the foregoing demurrer to plaintiff's complaint, and that the same is not interposed by the defendant for the purpose of delaying said suit or other proceedings therein.

DAVID McKENZIE,

Subscribed and sworn to before me this 17th day of May, 1911.

N. M. WARDALL,

Deputy County Auditor in and for the State of Washington, residing at Seattle.

(Seal)

Copy of Amended Dem. received and due service of same acknowledged this 17th day of May, 1911.

EDWARD JUDD, Per R.,
Solicitor for Plaintiff.

Indorsed: Amended Demurrer. Filed U. S. Circuit Court, Western District of Washington, May 25, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff.*
vs.
THE COUNTY OF KING, *Defendant.*

No. 1969.

OPINION.

Edward Judd, S. S. Langland and Walter A. Keene, for plaintiff. John F. Murphy and Robert Evans, for defendant.

RUDKIN, District Judge. This is a statutory action to recover possession of real property and to quiet title in the plaintiff. The complaint is somewhat voluminous and was doubtless prepared with a view of presenting, on the face of

the pleadings, the more important questions of law involved in the case.

It appears from the complaint that Lars Torgerson Grotnes was born in the City of Porsgrund, in the present Kingdom of Norway, on the 30th day of August, 1829. When he arrived at the age of majority he shipped as a sailor from his native city, went by way of England to Australia and thence to the City of San Francisco in the State of California, where he arrived in the year 1856. On his arrival in San Francisco he deserted the ship on which he was employed, because of abuse and ill treatment, and changed his name from Lars Torgerson Grotnes to John Thompson, in order to conceal his identity and thus avoid apprehension. He then came north to the vicinity of Elliott Bay, in King County, and resided in the counties of King and Kitsap, in the territory of Washington, until his death in the year 1865. While residing in King County he acquired title to one hundred and sixty acres of land, the greater part of which is now in controversy, under his assumed name of John Thompson. On the 26th day of March, 1865, one Daniel Bagley was appointed administrator of the estate of John Thompson, deceased, by the Probate Court of King County. Such proceedings were had in the settlement of the estate that on the 26th day of May, 1869, a final decree of distribution was entered which recited, among other things, that the administrator had obtained an order settling and allowing his final account on the 12th day of February, 1869; that a time had been fixed for hearing the application for a decree of distribution, and that due and legal notice of such hearing had been given. The decree then proceeded as follows:

"That said administrator has fully accounted to the Court for all of the said estate that has come into his hands and that the said estate, so far as discovered, has been fully administered and the residue thereof consisting of the property hereinafter mentioned, is ready for distribution; that all of the debts of the said deceased and of said estate and all the expenses of administration have been paid, and the said estate is in condition to be closed; that the decedent died intestate

in the County of King, Territory of Washington, on the —— day of March, 1865, leaving no heirs surviving him; there being no heirs of the said deceased, that the entire estate escheats to the County of King, Territory of Washington."

Therefore on this 26th day of May, 1869, no objections being made or filed, it is hereby ordered, adjudged and decreed that all of the acts of the said administrator as reported to this Court, and as appearing on the records thereof, be and the same are hereby approved and confirmed; that after deducting the estimated expenses of closing said estate, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter described, and now remaining in the hands of said administrator, and any other property not now known or discovered, which may belong to the said estate or in which the said estate may have an interest, be and the same is hereby distributed as follows, to-wit:

"The entire estate to the County of King, in Washington Territory;

"The following is a particular description of the said residue of the said estate referred to in said decree and of which distribution is ordered, adjudged and decreed, to-wit:

"160 acres of land on Duwamish River, more particularly described in a certain deed from Joseph Williamson and William Greenfield to Thompson, dated January 19, 1865, and recorded in Volume 1 of Deeds, page 458 (and personal property). Dated May 26, 1869."

The complaint then avers that this decree was null and void; that the Probate Court was without jurisdiction to declare an escheat; that all claims of the defendant and all acts done by the defendant in reference to the land in controversy have been done, performed and exercised under and by virtue of this void decree; that the defendant has no contract, deed, conveyance, decree, judgment or other writing evidencing or purporting to evidence any title on its part in or to said lands, and that the defendant has never, at any time, instituted any suit or legal proceeding of any nature before any court, officer or tribunal for the purpose of having an escheat of said lands adjudicated or declared, nor has any public authority

or officer ever begun or instituted any such suit or legal proceeding. The complaint next avers that upon the entry of the decree in the Probate Court the property in controversy was marked on the assessment rolls of the county as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof which the defendant has assumed to convey to private parties by deed; that in the year 1885 the County of King, in the then Territory of Washington, took possession of a certain portion of the tract, which said portion remained in its possession after the organization of the State of Washington and is generally known as the "King County Farm," which is specifically described in the complaint; that the last-described tract has never been used for any county purpose, but has been leased to tenants for the purpose of producing a revenue for the county; that about the year 1900 the defendant took possession of another portion, known as the "King County Hospital Grounds," which is specifically described in the complaint; that the defendant has placed upon the last-described tract valuable improvements in the shape of a hospital building and its appurtenances, the value of which are to the plaintiff unknown, and since thus taking possession the county has used and is now using the same for county hospital purposes; that in the year 1892 the defendant assumed to make a plat of a certain portion of the tract called the "King County Addition to the City of Seattle," and caused the plat thereof to be recorded in the office of the Auditor of King County as required by law; that the defendant has assumed to sell and convey to private parties all of the lots and lands composing this addition, except certain portions which are specifically described in the complaint; that in the year 1903 the defendant assumed to make a further plat of a certain portion of the tract called "King County 2nd Addition to the City of Seattle," and caused the plat thereof to be recorded in the office of the Auditor of King County, as required by law; that the defendant has assumed to sell and convey to private parties all of the lots and lands composing this addition. except certain portions which are particularly described in the complaint; that the tracts of land described as the "King County Farm," "King County

Hospital Grounds," "King County Addition to the City of Seattle," and "King County 2nd Addition to the City of Seattle," comprise the whole tract acquired by Grotnes or Thompson, except certain portions which have been appropriated for public purposes. The complaint further avers that the plaintiff herein is a son of the sister of Lars Torgerson Grotnes and one of his heirs at law, and that all the now living heirs at law of Grotnes have, by proper mesne conveyances, conveyed their right, title and interest in and to the lands described in the complaint to this plaintiff, who is now the sole owner in fee thereof. It is further averred that the heirs at law of Grotnes had no knowledge of what had become of him; did not learn of his death or the place in which he died, or of the fictitious name which he had assumed until within three years last past, and that since learning thereof such heirs, and particularly the plaintiff, have been diligently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson and his relationship to them.

To this complaint the defendant has interposed a demurrer on the grounds, among others, that the complaint does not state facts sufficient to constitute a cause of action, and that the action has not been commenced within the time limited by law:

At the time of the death of Grotnes, or Thompson, the Probate Practice Act of January 16, 1863, (Laws of '63, p. 198), entitled, "An Act defining the jurisdiction and practice in the Probate Courts of Washington Territory," was in force. Chapter XVI of that act provides for the partition and distribution of estates; chapter XVII for the descent of real property, and chapter XVIII for the distribution of personal property. Section 317 of the act provides that:

"Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the Court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled."

Section 318 provides that:

"In the decree the Court shall name the person and the

portion, or parts, to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

Section 319 provides that:

"The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The Court may order such further notice to be given as it may deem proper."

Section 340 provides:

"When any person shall die seized of any lands, tenements, or hereditaments, or any right thereto, or any title to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, as follows:"

The first seven subdivisions prescribe the rule or order of descent among the different degrees of kindred, and the eighth subdivision declares:

"If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

Section 353 provides for the distribution of the personal estate, and the seventh subdivision reads as follows:

"If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the county in which the administration is had, and a receipt by the county treasurer of the county to whom such personal property shall be conveyed by the administrator, shall be a full discharge of all responsibility to the said administrator."

The defendant contends, first, that the decree of distribution or escheat, made after due notice, pursuant to this statute, is binding upon the plaintiff and upon all the world; and, second, that in any event, it appears from the face of the complaint that the action is barred by the statute of limitations and by *laches*. The plaintiff, on the other hand, contends first, that property in a territory which escheats for want of heirs goes to the United States and not to the territory or any county

therein; second, that the act violates section eighteen hundred and fifty-one of the Revised Statutes, which declares that, "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and Laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no taxes shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents;" third, that the act violates section nineteen hundred and twenty-four of the Revised Statutes, which contains the following provision:

"To avoid improper influences, which may result from intermixing in the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

And, lastly, that an escheat can only be enforced by a common law proceeding in the nature of an inquest of office, and that the Territorial Probate Court had no common law jurisdiction.

I will first consider briefly the several objections urged against the validity of the territorial statute by the plaintiff. The first objection is, in my opinion, without merit. As already stated, the legislative power of the territory extended to all rightful subjects of legislation, and a statute providing for the descent and distribution of property in cases of intestacy would certainly seem to fall within that category. The act was never disapproved by Congress (Section 1850 U. S. R. S.); its validity has been recognized by both State and Federal Courts (*Territory v. Klee*, 1 Wash. 183; *Pacific Bank v. Hanna*, 90 Fed. 72), and, in the language of the Court in *Crane v. Reeder*, 21 Mich., 24:

"Congress never legislated on the subject, and there never has been an instance of an escheat claimed to have accrued to the United States since they came into existence."

Again the Court said:

"We have no tenures which would stand between the government and the estate, and it becomes, therefore, a very narrow inquiry where the escheat shall go."

"It would seem to be an obvious answer, that it must go where the law directs. Tenures and their incidents, the rules of inheritance, are all the creatures of the law, and except as to rights already vested, may be changed and modified at pleasure. And it was for the law-making power, that could control lands and their enjoyment in Michigan, to direct where lands should go for default of heirs, as it was to direct who should be regarded as heirs at all. For there is no such thing as a natural line of inheritance independent of the law. * * *"

"If Congress had seen fit to provide for such cases, we think it had power to do so. We are not prepared to question its authority on any theoretical grounds arising out of the conditions of cession, although those conditions are significant in construing the ordinance. This region was acquired by treaty, and did not come into the actual possession of the United States until after the Constitution was adopted, and it was held in *United States v. Repentigny* that the United States succeeded directly to the rights of the French and British Governments, which had complete supremacy. But the articles of confederation made no provision for the direct legislation of Congress over the local affairs of any part of the country, and such direct government, while possibly it might have been lawful, would have been at variance with the whole theory of local government, which had been acted upon both by states and colonies. The delegation of legislative powers to the territories was practically a necessity, and the ordinance of 1787, while retaining a right of vetoe or disapproval of the acts of the governor and judges, provided expressly that such laws as are not disapproved shall only be repealed by local authority. No one can read the ordinance without perceiving that it was intended to throw the whole regulation of local affairs upon the local government. The public lands were not to be interfered with till they had been severed from public domain by primary disposal. But when they had become private property, they came, like all private rights, under local regulation."

"Immediately after the Government of the United States was organized under the Constitution, a brief statute was passed to adapt the ordinance to the Constitution; not to change its

nature, but, as stated in the preamble, in order that it *'may continue to have full effect.'"*

"And so long as the system should continue, the whole local regulation was clearly delegated to the territory, as it was afterwards to Michigan when separately organized."

"Even under the old common law notions the creation of such a government would be at least an equivalent to the erection of a county Paletine, and would transfer all necessary sovereign prerogatives. But under this ordinance the territory only differed from a state in holding derivative instead of independent functions, and in being subject to such changes as Congress might adopt. But, until revoked or annuled, the act of the territory was just as obligatory as the act of Congress, and for the same reason."

The statute does not interfere with the primary disposal of the soil; that term is used in reference to the public lands of the United States and means their disposal by the officers or agents of the government to some person who, having the qualifications to acquire such lands, and having complied with the terms of the law, is entitled to a conveyance by patent or deed without any reserved authority in the government or its officers to withhold the same.

Topeka Commercial Security Co. v. McPherson, 7 Okla. 332.

Mormon Church v. United States, 136 U. S. 1, *Territory v. Lee,* 2 Mont. 124, and *Williams v. Wilson,* 1 Martin & Yerger, (1 Tenn., p. 247), cited by the plaintiff, are not in point. In the Mormon Church case the act of Congress explicitly declared that the property should be forfeited to the United States. In the Montana case the territorial legislature attempted to forfeit to the territory possessory rights in mining claims held by aliens, while the title to the property was vested in the general government. In the Tennessee case it does not appear that there was any territorial legislation on the subject, or that there was any territorial government to which the property could escheat.

The next contention is, that the provisions of the Probate Practice Act of 1863 relating to wills and to the descent and

distribution of property are not within the title of the act and therefore void. Mere lapse of time and a proper regard for the stability of titles forbid an inquiry into this question at this late day. All our probate laws have been enacted under similar titles, their validity has been recognized by the courts, and acquiesced in by the people, for upwards of half a century, and to overthrow them now would unsettle half the titles in the state. Furthermore, if the question were a new one the objection is not tenable. It is conceded that the provision relating to the distribution of estates is within the title, and, if so, it is but a short step to provide to whom distribution shall be made; otherwise the provision for distribution itself would be wholly inoperative.

It is lastly contended that the Probate Court had no jurisdiction to determine the rights of those claiming adversely to the estate and that it had no jurisdiction to declare or decree an escheat. The first proposition will be acceded to if claims adverse to the intestate are meant, but if it means the conflicting claims of those claiming under the intestate the proposition is wholly without merit, for such power is exercised by Probate Courts every day; in fact that is the principal office of a hearing on the application for a decree of distribution. Whether the Probate Court had jurisdiction to declare or decree an escheat depends entirely upon the construction of the local laws of the territory. It will be conceded that the usual form of proceeding for this purpose at common law was by an inquisition or inquest of office before a jury, but whether this or some other form of proceeding shall be resorted to depends wholly upon the legislative will. As said by the Court in *Hamilton v. Brown*, 161 U. S. 256, 263:

"In this country, when title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state."

There is nothing sacred about this or any other rule of the common law; for, as said by the Court in *Munn v. Illinois*, 94 U. S. 113, 134:

"A person has no property, no vested interest, in any rule

of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances."

It was therefore entirely competent for the legislature to provide that the territory or one of its counties should be the ultimate heir of those dying intestate and without other heirs or kindred; and it was further competent for it to provide that the rights of the territory or the county should be determined by the Probate Court in the administration proceeding in the same manner and by the same procedure as the rights of any other claimant to the estate.

It is conceded that under section 340 of the Probate Act relating to the descent of real property, it would have been entirely competent for the Court to determine that there were no children or lineal descendants of the intestate under subdivision one, and to distribute the property to the father under subdivision two. It would likewise have been competent for that Court to determine that there was no father or lineal descendants under subdivisions one and two and to distribute it to the brothers and sisters under subdivision three. Its determination upon these questions after due notice and hearing, on well established principles, would be binding upon the whole world.

McGee v. Big Bend Land Co., 51 Wash. 406.
In re Ostlund's Estate, 57 Wash. 359.
Case of Broderick's Will, 21 Wall. 503.
Proctor v. Dicklow, 45 Pac. 86.

Why was it not equally competent for the Probate Court to determine that there were no kindred and to escheat the property to the county? In my opinion such was the legislative intent, and this view of the subject is strengthened by reference to subdivision seven of section 353, relating to the

distribution of personal property. It is there provided that if there be no husband, widow or kindred of the intestate, the personal estate shall escheat to the county and the administrator shall convey it to the county treasurer. The provision is not that the administrator shall convey it to the county treasurer, if not claimed by husband, widow or kindred, but that he shall convey it if there are none such, and the Probate Court was necessarily invested with jurisdiction to determine that question. This view is further strengthened by the fact that the provision of section 480 of the Civil Practice Act of 1854 (Laws '54, p. 218), authorizing the prosecuting attorney to file an information in the District Court for the recovery of property escheated or forfeited to the territory, was eliminated by the Civil Practice Act of 1863 (Laws '63, p. 192), and since 1863 there was no provision in the laws of either the territory or state, in relation to escheats, except those found in the Probate Practice Act, until the passage of the Act of 1907.

'1 Rem. & Ball. Code, Sec. 1356, *et. seq.*

The latter act left the subject of escheats to be dealt with by the Court administering the estate as before, limiting only the time within which heirs must appear to claim the estate. The Probate Courts of the territory and the Superior Courts of the state have uniformly assumed jurisdiction in this class of cases, and the right of the state or county to appear in the probate proceeding and contest the rights of other claimants has been recognized by the highest court of the state.

In re Sullivan's Estate, 48 Wash. 631.

For these reasons I am of opinion that a valid title was vested in the county by the decree of the Probate Court and that the complaint states no cause of action. This view of the case renders it unnecessary to consider the question of adverse possession. If the complaint contains a defense on that ground it will at once be conceded that the pleading is very inartificially drawn with that object in view, but nevertheless it is difficult to escape the conclusion that the county has held the property adversely under color of title and claim of right far beyond the statutory period.

I have not overlooked the fact that the complaint avers that

Grotnes changed his name, but I assume that this allegation was inserted for the purpose of avoiding a charge of *laches* against the heirs. In any event, it is well established that a man may lawfully change his name, without resorting to legal proceedings, and for all purposes the name thus assumed by him will constitute his legal name, just as much as if he had borne it from birth; and legal proceedings instituted against him under the assumed name will bind him and those claiming under him.

29 Cyc. 271.

The demurrer is sustained.

Indorsed: Opinion. Filed in the U. S. District Court, Western District of Washington, May 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court of the Western District of Washington. Northern Division.

THOMAS CHRISTIENSON, *Plaintiff,*
vs.
THE COUNTY OF KING, *Defendant.*
No. 1969.

ORDER SUSTAINING DEMURRER.

This cause having come on for hearing before the Court on the amended demurrer of defendant to plaintiff's complaint, and the Court having heard the arguments of counsel for and on behalf of the respective parties on the 6th day of April, 1912, and having taken said cause under advisement, written briefs being presented and filed with the Court, and the Court having heretofor announced its decision sustaining said demurrer:

NOW, THEREFORE, in consideration of the premises, it is here and now ORDERED, ADJUDGED and DECREED that the amended demurrer of defendant to plaintiff's com-

plaint, be and the same is here and now sustained. To which order of the Court the plaintiff prayed an exception, which exception was by the Court allowed.

Dated this 16th day of May, 1912.

FRANK H. RUDKIN, Judge.

O. K. as to form.

EDWARD JUDD, Attorney for Plaintiff.

Indorsed: Order Sustaining Demurrer. Filed in the U. S. District Court, Western Dist. of Washington, May 16, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff,*
vs.
THE COUNTY OF KING, *Defendant.* } No. 1969.

ORDER ALLOWING AMENDMENT OF COMPLAINT.

And now on this day this cause having come on to be heard upon the motion of the plaintiff for leave to amend his complaint in this action;

IT IS HEREBY ORDERED by the Court, that the plaintiff be and he hereby is granted leave to file an amended complaint in this action, and it is hereby ordered that the amended demurrer of the defendant to the original complaint in this action stand to the amended complaint in this action.

Done in open Court this 25th day of May, 1912.

FRANK H. RUDKIN, Judge.

O. K. J. F. M.
R. H. E.

Indorsed: Order Allowing Amendment of Complaint. Filed in the U. S. District Court, Western Dist. of Washington, May 25, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff,*

vs.

THE COUNTY OF KING, *Defendant.*

No. 1969.

AMENDED COMPLAINT.

And now comes the plaintiff, and by leave of Court first had and obtained, files his amended complaint in the words and figures following, to-wit:

I.

That the plaintiff is a subject of the King of Norway.

II.

That the defendant is a municipal corporation, organized under the laws of the State of Washington, and is a citizen of the State of Washington.

III.

That the controversy in this action involves a subject of a foreign government and a citizen of the State of Washington, and of the United States of America. That the matter in dispute and controversy in this action, exclusive of interest and costs, exceeds in value the sum of Three Hundred Thousand Dollars ($300,000.00).

That the controversy in this action involves the construction of that portion of Amendment V to the Constitution of the United States which provides that private property shall not be taken for public use without just compensation.

That the controversy in this action involves the construction of those parts of Amendment V and XIV to the Constitution of the United States which provide that no person shall be deprived of property without due process of law.

That the controversy in this action involves the construction of the act of the United States Congress which established the

Courts of the Territory of Washington, creating among other judicial tribunals, the Probate Courts of said Territory, being Section 1907 of the Revised Statutes of the United States of 1874.

That the controversy in this action involves the construction of the act of the United States Congress vesting the legislative power of the Territory of Washington, and providing that no law shall be passed by the Territorial legislature interfering with the primary disposal of the soil, being Section 1851 of the Revised Statutes of the United States of 1874.

That the controversy in this action involves the construction of the act of the United States Congress restricting legislative power of the Territory of Washington, and providing among other things, that every law shall embrace but one object, and that shall be expressed in the title, being Section 1924 of the Revised Statutes of the United States of America of 1874.

IV.

That during the month of March, 1865, one Lars Torgerson Grotnes, departed this life in the County of King, in the Territory of Washington, intestate, and being at the time of his death a resident of the County of King. That at the time of his death, said Lars Torgerson Grotnes was commonly known in the neighborhood where he resided by the name of John Thompson.

V.

That prior to his death, said Lars Torgerson Grotnes had become the owner in fee of a certain tract or parcel of land, the title to which was conveyed to him under the name of John Thompson, which tract or parcel of land is located in the County of King and State of Washington, and more particularly described as follows, to-wit:

Beginning at a post on the right bank of Duwamish River, the same being the southeast corner of the Original Donation Land Claim of Luther M. Collins, in Township 24 North of Range 4 East, in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 deg. 04′ east, 124 chains to the north line of said claim, so as not to

enclose any of the improvements upon the east half of that portion of said claim deeded by said L. M. Collins to Joseph Williamson and William Greenfield; thence west along the north line of said claim, 20 chains and 67 links to a post, the same being the northwest corner of said claim; thence south along the west boundary of said claim, 82 chains to a post on the right bank of the Duwamish River, being the southeast corner of Eli B. Maple's land claim; thence along the meanderings of said river to the southwest corner of said land claim, the place of beginning, so as to contain 160 acres.

That said Lars Torgerson Grotnes, under the name of John Thompson, acquired title to said land by a deed conveying the same in fee to him by Joseph Williamson and William Greenfield, which deed was duly recorded in the office of the Recorder of Conveyances of the County of King in the Territory of Washington, in Vol. 1 of Deeds on page 14.

That said Joseph Williamson and William Greenfield acquired title to said land by a deed conveying the same in fee to them from Luther M. Collins, which deed was duly recorded in the office of the Recorder of Conveyances of the County of King in the Territory of Washington, in Vol. "A" of Deeds, on page 516.

That said Luther M. Collins acquired title to said land by a patent conveying to him the same in fee from the United States of America, which patent was duly recorded in the office of the Recorder of Conveyances of the County of King in the Territory of Washington, in Vol. 13 of Deeds, on page 699.

VI.

That said Lars Torgerson Grotnes died a bachelor, leaving him surviving as his heirs at law, two brothers, one sister, and the children of a deceased sister, all of whom were subjects of the King of Norway. That the plaintiff is a son of a sister of said Lars Torgerson Grotnes, and one of his heirs at law. That all the other now living heirs at law of said Lars Torgerson Grotnes have by proper mesne conveyances, conveyed their right, title and interest in and to said land above described to the plaintiff. That the plaintiff is now the sole owner in fee of said land.

VII.

That said Lars Torgerson Grotnes was born on or about the 30th day of August, 1829, in the City of Porsgrund, in the Kingdom of Norway. That the name of his father was Torger Engebretson Grotnes, and the name of his mother, was Catherine Grotnes. That at the age of about 21 years, he shipped as a sailor from said city of Porsgrund and went by way of England to Australia, and thence in the year 1856, to the city of San Francisco, California. That while in the harbor of said last named city, he fled from the sailing vessel on which he was a sailor because of abuse and ill treatment. That he changed his name from Lars Torgerson Grotnes, to John Thompson in order to conceal his identity, so that he could not be apprehended and brought back to the vessel from which he had fled. That he came to the neighborhood of Elliott Bay in said King County, and resided in the neighborhood of the same in King County and Kitsap County, in said Territory of Washington, until the time of his death in 1865. That he acquired the land above described under the name of John Thompson.

VIII.

That the heirs at law of Lars Torgerson Grotnes had no knowledge of what had become of him, and did not learn about his death and the place in which he died, nor of the fictitious name which he had assumed, until within three years last past. That since learning thereof, such heirs, and particularly the plaintiff, have been diligently engaged in searching for and procuring the proper proofs of the identity of Lars Torgerson Grotnes and John Thompson, and his relationship to them.

IX.

That on the 26th day of March, 1865, the Probate Court of the County of King in the Territory of Washington, assumed to appoint one Daniel Bagley, administrator of the estate of John Thompson, deceased.

That there was presented to said Probate Court a document in the words and figures following to-wit:

"Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.

H. L. YESLER,
J. WILLIAMSON,

Dated March 11, 1865."

That the said document last above described was the only document presented to said Probate Court purporting to be a petition for the appointment of an administrator of the estate of John Thompson, deceased.

That on the 26th day of March, 1865, said Probate Court as above stated, assumed to appoint Daniel Bagley administrator of the estate of John Thompson, deceased, and the only order thus appointing said Bagley was in the words and figures following, to-wit: "Whereas, John Thompson, of the county aforesaid, on the ..... day of March, 1865, died intestate, leaving at the time of his death property subject to administration,

Now, therefore, know all men by these presents that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.

THOMAS MERCER, Probate Judge.

Dated March 26, 1865."

That on May 26, 1868, there was presented to said Probate Court a petition in the words and figures following, to-wit:

"In the Matter of the Estate of JOHN THOMPSON, Deceased; DANIEL BAGLEY, Administrator.

Alexander Gow and James W. Bush being duly sworn upon their oaths depose and say that they are County Commissioners of King County in Washington Territory, that as affiants are informed and believe there is a large sum of money remaining in the hands of said Daniel Bagley, as administrator of said estate, that no heirs have ever appeared to claim the balance in said administrator's hands, that as affiants verily believe no heirs of said Thompson are known to exist; that King County

is entitled to the balance remaining in said administrator's hands.

Wherefore said affiants pray your honor to make an order requiring said Bagley to render an account of the balance in his hands of said estate and requiring him to forthwith pay the same to the treasurer of said King County, as required by law.

To the Probate Court of King County in Washington Territory.

ALEX. GOW,
JAMES W. BUSH.

Subscribed and sworn to before me this 6th day of May, 1868. Witnes my hand and official seal.

(Seal) IKE M. HALL,
Auditor said King County.

Filed May 26, 1868. T. Mercer, Probate Judge."

That based upon the petition last described, there was issued by the said Probate Court a certain citation against Daniel Bagley, administrator of the estate of John Thompson, deceased, which was served upon him by the sheriff of said county of King in the Territory of Washington, which citation and return thereon were in the words and figures following, to-wit:

"Territory of Washington,
County of King—ss.

In the Probate Court of said King County, in the matter of the estate of John Thompson, Deceased.

To the Sheriff of said King County, Greeting:

Whereas the County Commissioners of said King County have filed in the said Probate Court their application under oath asking an order of said court requiring Daniel Bagley to render his final account as administrator of the estate of said John Thompson, deceased, and to pay over to King County the residue of said estate remaining in his hands as such administrator.

Now, therefore, in the name of the United States of America, you are hereby commanded to cite said Daniel Bagley to be

and appear in said Probate Court on the first day of the next term thereof then and there to show cause why such orders shall not be made and an attachment issue against him to compel obedience thereto.

IN TESTIMONY WHEREOF, I, the undersigned Probate Judge, in and for said King County, have hereunto set my hand and affixed my official seal this 26th day of May, 1868.

(Seal) T. MERCER, Probate Judge.

This citation came into my hands May 26th, 1868. Served the same by delivering a true copy to said Daniel Bagley, May 27th, 1868.

L. V. WYCKOFF, Sheriff.
By L. S. SMITH, Deputy.

Services	$1.00
Copying 200 words	.40
	1.40

That on July 27, 1868, there was presented to said Probate Court a report of Daniel Bagley, administrator of the estate of John Thompson, deceased, which was in the words and figures following, to-wit:

"July 27th, 1868.

To the Hon. Probate Court of King Co., W. T., holding terms at Seattle, W. T.:

In answer to your citation in the case of John Thompson, deceased, under date of May 26th, 1868, I have to say, that only a few weeks before that I was called upon by Mr. Wold in behalf as he signified of the countrymen of John Thompson and earnestly requested to keep the matter in my hands till he could ascertain the whereabouts of the heirs, as they were well assured that heirs were living in Sweden.

I ask at least till another term of your court to see result of said action and if no word be had of heirs, then that I turn over to the County of King, the property and effects in my hand, so as to make final report to you at the next state term of your court.

DANIEL BAGLEY, Admr."

That on the 29th day of October, 1868, there was presented to said Probate Court an affidavit in the words and figures following, to-wit:

"Territory of Washington,
County of King—ss.

In the Probate Court of King Co., W. T.

In the Matter of the Estate of JOHN THOMPSON, Dc.

John J. McGilvra on oath says that he is a citizen of King County, W. T., that he has been applied to by the Board of County *Commissions* of King County to pursue the proper action of the above named court to compel Dan'l Bagley, administrator of said estate, to settle with the Court and place said estate in such a position that said county, to whom said estate by law escheats, may have the full benefit thereof. That no definite agreement as to such employment was made, yet affiant believes that a majority, if not all, of the said Board of County Commissioners desire affiant to proceed as the attorney of the county in the premises; affiant further says that it had escaped his memory that this was the time for a regular term of said court or he would have been present and resisted the entry up of said order, now moved to be vacated or any such order in the premises.

Subscribed and sworn to before me this 28th day of October, A. D. 1868.

JOHN J. McGILVRA.

Filed Oct. 29, 1868."

That on February 10, 1869, there was presented to said Probate Court a petition for disposition of the estate of John Thompson, deceased, which was in the words and figures following, to-wit:

"Territory of Washington,
County of King—ss.

In the Probate Court of King County, aforesaid.

In the Matter of the Estate of JOHN THOMPSON, Dcs.

And now comes the County of King, by their attorney, John J. McGilvra, and moves the Court to revoke the letters of administration issued to Daniel Bagley on or about the 26th day of March, A. D. 1865, for the following reasons:

1st. Because he has been guilty of negligence in failing to make an exhibit as required by S. 285, p. 251, Laws of W. T. of 1863.

2nd. Because he has been guilty of negligence in failing to render his annual accounts (none ever having been rendered) as required by S. 287, p. 251, Laws of W. T., of 1863.

3rd. Because he has proceeded to sell real estate without obtaining a proper order upon petition and notice, as required by Sections 217 and 218, 219, p 239, Laws of W. T., of 1863.

4th. Because no notice of such sale was given as required by S. 228 and cP. of Laws of 1863.

5th. Because no return of such sale was made as required by Sec. 222, P. 241, aforesaid.

6th. Because he has procured no order of confirmation as required by Sec. 234, P. 242, Laws of W. T., of 1863, but has proceeded to deed without such confirmation.

7th. Because the said administrator has been guilty of gross negligence and mismanagement generally in connection with the said estate.

JOHN J. McGILVRA,
Attorney for King Co.

Filed Feb. 10th, 1869."

That on February 12, 1869, there was presented to said Probate Court a petition for disposition of the estate of John Thompson, deceased, which was in the words and figures following, to-wit:

"In the Probate Court of King County and Washington Territory.

In the Matter of the Estate of JOHN THOMPSON, Deceased.

PETITION FOR DISPOSITION OF THE ESTATE.

To the Hon. Probate Court of King County, W. T.:

The petition of Daniel Bagley, admr. of the estate of John Thompson, deceased, respectfully shows:

That the final account of your petitioner as such admr. has been filed, and after due hearing and examination was finally settled.

That all the debts of said deceased, and of the estate, and all the expense of the administration thus far incurred, and the taxes that have attached to, or accrued against the said estate have been paid and discharged, and the said estate is now in a condition to be closed.

That the residue of the said estate now remaining in the hands of your petitioner is fully set forth and described in the schedule marked A hereunto annexed and made a part of this petition. That no heirs at law of the said John Thompson have been found after diligent search and effort.

Therefore your petitioner prays that the administration of said estate may be brought to a close, and that he may be discharged from his trust as such administrator. That after due notice given any proceedings had the estate remaining in his hands, as petitioner aforesaid, may be turned over to King County, Washington Territory; or such other or further order made as may be meet in the premises.

And your petitioner will ever pray.

Dated February 12th, A. D. 1869.

DANIEL BAGLEY, Admr."

That in pursuance of the petition last described, there was published a notice of the hearing of said petition, the affidavit of the publication of which notice and said notice filed in said Court were in the words and figures following, to-wit:

"Territory of Washington.
County of King—ss.

S. L. MAXWELL, on oath says that he is the publisher of a weekly newspaper published in Seattle, King Co., W. T., and that the notice, of which a copy is hereto attached, was published therein for four successive weeks from the 5th day of April to the 26th day of April, 1869, inclusive.

S. L. MAXWELL.

Subscribed and sworn to before me this 26th day of May, A. D. 1869.

DANIEL BAGLEY,
Notary Public, Seattle, W. T."

"*In the Probate Court of King County, W. T.*

In the Matter of the Estate of JOHN THOMPSON, Deceased.

ORDER TO SHOW CAUSE WHY DECREE OF DISTRIBUTION SHOULD NOT BE MADE.

On reading and filing the petition of Daniel Bagley, administrator of the estate of John Thompson, deceased, setting forth that he had filed his final account of his administration of the estate of said deceased in this Court, and that the same has been duly settled and allowed, that all the debts and expenses of the said administration have been duly paid, and that a portion of said estate remains to be divided among the heirs of said deceased, and praying among other things for an order of distribution of the residue of said estate among the persons entitled:

It is ordered: That all persons interested in the estate of the said John Thompson, deceased, be and appear before the Probate Court of the County of King, and Territory of Washington, at the court room of said Court, in the Town of Seattle, in said County, on MONDAY, the 26th day of April, A. D. 1869, at 10 o'clock a. m., then and there to show cause why an order of distribution should not be made of the residue

of said estate among the heirs of said deceased according to law.

It is further ordered that a copy of this order be published for four successive weeks before the said 26th day of April, A. D. 1869, in the Seattle Intelligencer, a newspaper printed and published in the said County of King.

Dated March 29th, 1869.

THOMAS MERCER,
Clerk and Probate Judge."

That such proceedings were had in said estate in said Probate Court, that on the 26th day of May, 1869, a final decree of distribution was entered in said estate, which decree is in the words and figures following, to-wit:

"*In the Probate Court of King County, Washington Territory.*

In the Matter of the Estate of JOHN THOMPSON, Deceased. } Decree of Distribution of the Estate.

Daniel Bagley, the Administrator of the Estate of John Thompson, deceased, having on the 12th day of February, A. D. 1869, filed in this Court his petition, setting forth, among other matters, that his accounts have been finally settled and that all the debts of said decedent and of said estate, and the expenses and charges of administration have been paid, that a portion of said estate remains in his hands, and praying for an order of distribution of the residue of said estate, remaining in his hands as aforesaid:

And this Court having thereupon, to-wit: on the day aforesaid, made an order directing all persons interested in said estate to be and appear before this Court, at the court room thereof, on Monday, the 26th day of April, A. D. 1869, at 10 o'clock a. m., then and there to show cause why an order of distribution should not be made of the residue of said estate according to law, and directing a copy of said order to show cause to be published for four successive weeks before the said 26th day of April, A. D. 1869, in the "Weekly Intelligencer," a

newspaper printed and published in the County of King, Washington Territory;

And at said hour on the said 26th day of April, A. D. 1869, upon satisfactory proof of the due publication in said newspaper of said order to show cause for four successive weeks before said 26th day of April, A. D. 1869, as directed by said Court, the hearing of said petition was by order of this Court duly made and entered, continued until this 26th day of May, A. D. 1869, at 10 o'clock a. m., and at the last mentioned hour and time, the said administrator appearing in person,

This Court proceeded to the hearing of said petition, and the inventory and appraisement of said estate, the final account of said administrator, the decree allowing and settling the same, and the decree of due publication of notice to creditors, together with other documentary evidence and record proofs, were offered and put in evidence, and the said administrator, Daniel Bagley, examined in open court.

And it appearing to the satisfaction of this Court, from said documentary and other proofs, and said examination of said administrator

That said Daniel Bagley duly qualified as such administrator on the 26th day of March, A. D. 1865, and thereupon entered upon the administration of said estate, and has ever since continued to administer the same;

That due and legal notice to creditors was published, and that a true inventory and appraisement of said estate were duly made and returned to this Court;

That more than four years have elapsed since the appointment of said Daniel Bagley as such administrator, and more than four years have expired since the first publication of said notice to creditors;

That said administrator has fully accounted for all the estate that has come to his hands, and that the whole estate, so *far* as it has been discovered, has been fully administered, and the residue thereof, consisting of the property hereinafter particularly described, is now ready for distribution.

That all the debts of said decedent and of said estate, and all the expenses of the administration thereof thus far in-

curred, and all taxes that have attached to or accrued against the said estate, have been paid and discharged, and said estate is now in a condition to be closed;

That said decedent died intestate in the County of King, Washington Territory, on the .... day of March, A. D. 1865, leaving no heirs surviving him;

That since the rendition of his final account, the sum of ($8.00) has been expended by said administrator, the voucher whereof is now presented and filed and said payment is approved by this Court; and the estimated expenses of closing said estate will amount to the sum of $.....

There being no heirs of said decedent, that the entire estate escheat to the County of King, in Washington Territory.

Now on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise;

It is hereby ordered, adjudged and decreed: that all the acts and proceedings of said administrator, as reported by this Court and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting said estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the County of King, in Washington Territory.

And it is further ordered that the said administrator, upon payment and delivery of the said residue as hereinbefore ordered, and upon filing due and proper vouchers and receipts therefor in this Court, be fully and finally discharged from his trust as such administrator, and that his sureties shall thereupon and thenceforth be discharged from all liability for his future acts.

The following is a particular description of the said residue

of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, to-wit:

1st. Cash, to-wit: $343.83 gold coin.

2nd. And real estate, to-wit: One hundred and sixty acres of land on Duwamish River, in King County, W. T., more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson, dated January 19th, A. D. 1865, and recorded in Volume 1 of the records of King County, W. T., on pages 458, 459 and 460.

Third. A lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid.

Dated May 26th, 1869.

THOMAS MERCER,
Probate Judge.

Probate Journal.
Volume "A," page 175."

IX.

That said decree was null and void, and said Probate Court was wholly without jurisdiction to in any manner vest, transfer, convey, fix or pass upon the title to the land described in said decree, and had no power or authority to declare said land escheated which is the same land as above described.

That all claims to said land by the defendant, and all acts done by the defendant in reference to said land, and all control exercised or attempted to be exercised by the defendant over said land, have been made, done, performed and exercised, under and by virtue of said null and void decree above described.

That the defendant has not, and never has had any contract, deed, conveyance, decree, judgment, nor other writing, record or document evidencing, or purporting to evidence any title on its part in or to said land.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having an escheat of said land adjudicated, adjudged or declared; nor has any

other authority or officer ever begun or instituted any such suit or legal proceeding.

That the defendant has never at any time begun or instituted any suit or legal proceeding of any nature before any court, officer or tribunal, for the purpose of having any title, or claim of title, which it had or might have in said land established, approved, confirmed or quieted; nor has any other public authority or officer ever begun or instituted any such suit or legal proceeding.

X.

That after the entry of said decree, the land above described was marked upon the assessor's roll as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof hereinafter described, which the defendant has assumed to convey to private parties by deed.

That about the year 1885, the County of King, in the then Territory of Washington, occupied a certain portion of the tract of land above described, which said portion remained in its occupancy and after the organization of the State of Washington, has remained in the control of the defendant, and is generally known as the "King County Farm," and is more specifically described as follows:

Beginning at a post on the right bank of the Duwamish River, the same being the southwest corner of the original donation land claim of Luther M. Collins, in Township 24 North, Range 4 East, in Section 29; running thence east along the south boundary of said claim, and the north boundary of J. Bush's claim 14 chains and 3 links; thence north 13 degrees and 4′ east, to the east bank of the Duwamish River; thence in a southwesterly direction along the meanderings of said river to the place of beginning.

That the same has never been used for any county purposes, but has been let out to tenants for the purpose of being farmed and producing a monetary income for the county.

That about the year 1900, the defendant occupied a portion of the tract of land first above described, which portion is known as the "King County Hospital Grounds," and is more specifically described as follows:

Beginning at the southeast corner of block 6 in King County Addition to the City of Seattle, thence along the southwest side of said block 6 to the southwest corner of said block 6; thence south to the east bank of the Duwamish river; thence in a southerly direction along the east bank of said Duwamish River to the point of its intersection with the west line of Charleston Avenue; thence in a northeasterly direction along the west side of Charleston Avenue to the place of beginning.

That the defendant has placed upon the last described tract of land valuable improvements in the shape of a hospital building and its appurtenances, the exact value of which are to the plaintiff unknown, and since thus occupying the last described tract, has been and now is using the same for county hospital purposes.

That in the year 1892, the defendant assumed to make a plat of a certain portion of the tract of land first above described, and caused the same to be called the "King County Addition to the City of Seattle," and caused the same to be recorded in the office of the Auditor of King County in Volume VIII of Plats on page 59.

That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County Addition, except such portion as is described as follows:

"Lots 1, 2, 3, 4, 8 and 9 in Block 5; Lots 5, 6, 7, 8, 9, in Block 7, which said Lots always have been and now are vacant and unoccupied, and Lots 20 and 21 in Block 7, which last two lots were unoccupied and vacant until within less than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income.

That in the year 1903, the defendant had assumed to make a plat of a certain portion of the tract of land first above described and caused the same to be called "King County 2nd Addition to the City of Seattle," and caused the same to be recorded in the office of the Auditor of said King County, in Volume XI of Plats, on page 1. That the defendant has assumed to sell and convey to private parties all of the land composing said last named King County 2nd Addition, except such portion as is described as follows:

Lots 1 to 9 both inclusive; Lots 13 to 16 both inclusive, and Lots 20 to 27 both inclusive, in Block 1; all of Blocks 2, 3 and 4; Lots 1 to 4 both inclusive; 8, 9, 12 to 16 both inclusive, and 21 to 25 both inclusive, all in Block 5; Lots 1 to 14 both inclusive, and 20 to 23 both inclusive in Block 6; Lots 2, 6 to 9 both inclusive, and 18 to 20 both inclusive, all in Block 7; Lot 1 in Block 8; and Lots 2 to 5 both inclusive in Block 12, which said Lots always have been and now are vacant and unoccupied, and Lots 10 to 12 both inclusive, and 17 to 19 both inclusive, all in Block 1, which 6 last described lots were unoccupied and vacant until within less than ten years last past, but within the time last mentioned have been leased by the defendant to other parties to produce a monetary income.

XI.

That the tracts of land hereinbefore described as the "King County Farm;" "King County Hospital Grounds;" "King County Addition to the City of Seattle" and "King County 2nd Addition to the City of Seattle," together comprise the whole of the tract herein first above described as being the property belonging to Lars Torgerson Grotnes, except certain portions thereof which have been appropriated for public or quasi public purposes for railroad rights of way or highways.

XII.

That the plaintiff is entitled to recover from the defendant all of the buildings and improvements and tangible betterments which the defendant placed upon or attached to said land prior to the year 1903, but the plaintiff hereby expressly disclaims all right to any such buildings, improvements or tangible betterments, and hereby admits and consents that the defendant may retain the same, or be reimbursed for the same out of the said land at the present value of said buildings, improvements and tangible betterments.

* * * * * * *

WHEREFORE, the plaintiff prays that he may recover possession from the defendant of the land hereinbefore described as the "King County Farm;" the land hereinbefore described as the "King County Hospital Grounds;" the land hereinbefore

stated not to have been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County Addition to the City of Seattle," and the land hereinbefore stated not to have been assumed to be sold and conveyed by the defendant to private parties, which is located in said "King County 2nd Addition to the City of Seattle;" and that the plaintiff may recover of the defendant the costs of this action.

EDWARD JUDD,
S. S. LANGLAND and
W. A. KEENE,
Attorneys for Plaintiff.

P. O. Address: 620-621 New York Block, Seattle, Washington.

State of Washington,
County of King—ss.

THOMAS CHRISTIANSON being first duly sworn on oath deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing amended complaint, and knows the contents thereof, and verily believes the same to be true.

THOMAS CHRISTIANSON.

SUBSCRIBED and sworn to before me this 18th day of May, A. D. 1912.

ANNA RASDALE,
Notary Public in and for the State of Washington,
residing at Seattle.

Copy of within Amended Complaint received and service of the same acknowledged this 21st day of May, 1912.

JOHN F. MURPHY and
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Amended Complaint. Filed in the U. S. District Court, Western Dist. of Washington, May 27, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTENSON, *Plaintiff,*

vs.

THE COUNTY OF KING, *Defendant.*

No. 1969.

ORDER SUSTAINING DEMURRER AND FINAL JUDGMENT.

This cause coming on for hearing on the amended demurrer of defendant to the amended complaint of plaintiff, and the court having examined said amended complaint and each and all of the allegations thereof, and being of the opinion, for the reasons heretofore assigned by this court now on file in this cause, that said demurrer to said amended complaint should be sustained:

Now, therefore, it is here and now ORDERED, ADJUDGED and DECREED that said demurrer be and the same is here and now sustained.

The plaintiff having elected to stand upon said amended complaint and having refused to plead further in said action, it is here and now ORDERED, ADJUDGED and DECREED that said action be and the same is here and now dismissed with prejudice and with costs to defendant.

Done in open court this 8th day of June, 1912.

FRANK H. RUDKIN, Judge.

Copy of within order received and service of same acknowledged this 27th day of May, 1912.

EDWARD JUDD and
S. S. LANGLAND,
Attorneys for Plaintiff.

Indorsed: Order Sustaining Demurrer and Final Judgment. Filed in the U. S. District Court, Western Dist. of Washington, June 8, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff.*
vs.
THE COUNTY OF KING, *Defendant.*
No. 1969.

PETITION FOR WRIT OF ERROR.

THOMAS CHRISTIANSON, plaintiff in the above entitled action, feeling himself aggrived by the judgment entered in the above entitled action on the 8th day of June, 1912, comes now by Edward Judd, S. S. Langland and W. A. Keene, his attorneys, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also for an order fixing the amount of security which the said plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings in said District Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

EDWARD JUDD,
S. S. LANGLAND,
W. A. KEENE,
Attorneys for Plaintiff.

Received a copy of the within Petition this 14th day of June, 1912.

JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 17, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff*,
vs.
THE COUNTY OF KING, *Defendant*. } No. 1969.

ASSIGNMENT OF ERRORS.

And now comes the above named plaintiff, Thomas Christianson, by his attorneys, Edward Judd, S. S. Langland and W. A. Keene, and in connection with his petition for a writ of error herein, makes the following Assignment of Errors which he will urge upon the prosecution of his said writ of error in the above entitled action, and which he avers occurred upon the trial and hearing of said action, to-wit:

1. The Court erred in sustaining the defendant's amended demurrer to the plaintiff's amended complaint.

2. The Court erred in not overruling the defendant's amended demurrer to the plaintiff's amended complaint.

3. The Court erred in not requiring the defendant to answer the amended complaint of the plaintiff.

4. The Court erred in rendering and entering the judgment in the above entitled action dismissing the action of the plaintiff.

WHEREFORE said plaintiff, Thomas Christianson, prays that said judgment of the District Court of the United States for the Western District of Washington, Northern Division, be reversed, and that said Court be instructed to overrule the defendant's amended demurrer to the plaintiff's amended complaint, and require the defendant to answer said amended complaint, and proceed with the further hearing of the action in the above entitled action in accordance with law.

EDWARD JUDD,
S. S. LANGLAND,
W. A. KEENE,
Attorneys for Plaintiff.

Received a copy of the within Assignment of Errors this 14th day of June, 1912.

JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, June 17, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff,*
vs.
THE COUNTY OF KING, *Defendant.* } No. 1969.

ORDER ALLOWING WRIT OF ERROR.

Upon motion of Edward Judd, S. S. Langland and W. S. Keene, attorneys for plaintiff in the above entitled action, and upon the filing of the petition for a writ of error and an assignment of errors in this action;

IT IS ORDERED, that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error, such bond to act as a supersedeas thereon, be and is hereby fixed at Three Hundred Dollars.

Done in open Court this 21st day of June, 1912.

FRANK H. RUDKIN, Judge.

O. K. as to amount of bond.

JOHN F. MURPHY,
ROBERT EVANS,
Attorneys for Defendant.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff,*
vs.
THE COUNTY OF KING, *Defendant.* } No. 1969.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:

That THOMAS CHRISTIANSON, above named as principal, and AMERICAN SURETY COMPANY, of New York, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the County of King, defendant above named, in the full and just sum of Three Hundred Dollars, to be paid to the said defendant, to which payment well and truly to be made the said principal binds himself and his heirs, executors, administrators and assigns, and the said surety binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 17th day of June, 1912.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT:

WHEREAS, lately, at a session of the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said Court between the said Thomas Christianson, as plaintiff, and the said County of King as defendant, there was on the 8th day of June, 1912, rendered a final judgment against said plaintiff for the costs of suit; and

WHEREAS, the said plaintiff has obtained from the said

District Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant has been issued citing and admonishing the defendant to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco, California, or at such place as may be provided by law; now, therefore,

If the said Thomas Christianson shall prosecute his writ of error to effect, and shall answer all damages and costs that may be awarded against him if he fails to make his plea good, then the above obligation is to be void; otherwise to remain in full force and effect.

THOMAS CHRISTIANSON (Seal).
By Edward Judd, His Attorney.

(Seal) AMERICAN SURETY COMPANY OF NEW YORK.
By Edward Lyons, Resident Vice-President.
S. H. Melrose, Resident Assistant Secretary.

The sufficiency of the surety to the foregoing bond approved by me this 21st day of June, 1912.

FRANK H. RUDKIN,
District Judge.

O. K. as to form.
JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant.

Indorsed: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

In the United States District Court for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON, *Plaintiff,*
vs.
THE COUNTY OF KING, *Defendant.*
No. 1969.

PRAECIPE FOR TRANSCRIPT OF RECORD.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare and certify a transcript for the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following files, records and papers in the above entitled case:

1. Complaint. Filed April 24, 1911.
2. Amended Demurrer to Complaint. Filed May 25, 1911.
3. Opinion. Filed May 8, 1912.
4. Order Sustaining Amended Demurrer to Complaint. Filed May 16, 1912.
5. Order Allowing Amendment of Complaint. Filed May 27, 1912.
6. Amended Complaint. Filed May 27, 1912.
7. Order Sustaining Amended Demurrer to Amended Complaint and Judgment. Filed June 8, 1912.
8. Petition for Writ of Error. Filed June 17, 1912.
9. Assignment of Errors. Filed June 17, 1912.
10. Order Allowing Writ of Error and fixing Bond.
11. Writ of Error and Copy and Proof of Service.
12. Citation and Copy and Proof of Service.
13. Bond.
14. Praecipe.

EDWARD JUDD,
S. S. LANGLAND,
W. A. KEENE,
Attorneys for Plaintiff.

Indorsed: Praecipe for Transcript of Record. Filed in the U. S. District Court, Western Dist. of Washington, June 21, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

THOMAS CHRISTIANSON,
Plaintiff in Error,
vs.
THE COUNTY OF KING,
Defendant in Error.
No. 1969.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, A. W. Engle, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing fifty-five printed pages, numbered from one to fifty-five, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the Praecipe of the Attorneys for Plaintiff in Error, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitutes the return to the Writ of Error received and filed in the office of the Clerk of the said District Court on June 21, 1912.

I further certify that I annex hereto and herewith transmit the original Writ of Error and Citation in said cause.

I further certify that the cost of preparing and certifying the foregoing return to Writ of Error is the sum of Sixty-five Dollars and Ninety-five Cents ($65.95), and that the said sum has been paid to me by Messrs. Edward Judd, Samuel S. Langland and Walter A. Keene, of counsel for Plaintiff in Error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 25th day of July, 1912.

(Seal) A. W. ENGLE, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THOMAS CHRISTIANSON,
Plaintiff in Error,
vs.
THE COUNTY OF KING,
Defendant in Error.

No. 1969.

CITATION.

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES TO THE COUNTY OF KING and to JOHN F. MURPHY and ROBERT H. EVANS, DEFENDANT'S ATTORNEYS:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 21st day of July, 1912, pursuant to a Writ of Error filed in the Clerk's office for the District Court of the United States for the Western District of Washington, Northern Division, wherein THOMAS CHRISTIANSON is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 21st day of June, 1912.

(Seal) C. H. HANFORD,
District Judge Presiding in the United States District Court for the Western District of Washington, Northern Division.

We hereby accept due personal service of the foregoing Citation on behalf of The County of King, Defendant in Error, and for ourselves as Defendant's Attorneys, this 9th day of July, 1912.

JOHN F. MURPHY,
ROBERT H. EVANS,
Attorneys for Defendant in Error, The County of King.

Indorsed: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Thomas Christenson, Plaintiff in Error, vs. The County of King, Defendant in Error. CITATION. Filed in the U. S. District Court, Western Dist. of Washington, Jun. 21, 1912. A. W. Engle, Clerk, by S., Deputy. Edward Judd, S. S. Langland, W. A. Keene, Attorneys for Plaintiff, 620 New York Block, Seattle, Washington.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THOMAS CHRISTIANSON, *Plaintiff in Error,* vs. THE COUNTY OF KING, *Defendant in Error.*	No. 1969. WRIT OF ERROR.

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRIC OF WASHINGTON, NORTHERN DIVISION—GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between THOMAS CHRISTIANSON, Plaintiff, and THE COUNTY OF KING, Defendant, a manifest error has happened to the great damage of the said Plaintiff, THOMAS CHRISTIANSON, and it being fit, and we being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your Seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit; together with this Writ, so that you have the same at the City of San Francisco,

in the State of California, on the 21st day of July, 1912, in said Circuit Court of Appeals, to be then and there held, and that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done herein, to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord, one thousand nine hundred and twelve, and of the Independence of the United States one hundred and thirty-sixth.

(Seal) A. W. ENGLE,
Clerk of the District Court of the United States, for the Western District of Washington, Northern Division.

By F. A. SIMPKINS, Deputy Clerk.

The foregoing Writ is allowed by me this 21st day of June, 1912.

C. H. HANFORD,
District Judge, Presiding in the United States District Court for the Western District of Washington, Northern Division.

We hereby accept due personal service of the foregoing Writ of Error on behalf of The County of King, defendant in error, this 9th day of July, 1912, and acknowledge receipt of a copy of said Writ of Error, copy of Bond on Writ of Error, copy of Assignment of Errors, copy of Petition for Writ of Error, and copy of Order Allowing Writ of Error.

JOHN F. MURPHY,
ROBT. H. EVANS,
Attorneys for The County of King, Defendant in Error.

Indorsed: Original. In the United States Circuit Court of Appeals for the Ninth Circuit. Thomas Christenson, Plaintiff in Error vs. The County of King, Defendant in Error. WRIT OF ERROR. Filed in the U. S. District Court, Western Dist. of Washington, Jun. 21, 1912, A. W. Engle, Clerk, by S., Deputy. Edward Judd, S. S. Langland, W. A. Keene, Attorneys for Plaintiff, 620 New York Block, Seattle, Washington.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THOMAS CHRISTIANSON,
Plaintiff in Error,

vs.

THE COUNTY OF KING,
Defendant in Error.

ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION. HON. FRANK H. RUDKIN, Judge.

Brief for Plaintiff in Error

EDWARD JUDD,
S. S. LANGLAND,
W. A. KEENE,
Attorneys for Plaintiff in Error.

620 NEW YORK BLOCK
SEATTLE

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THOMAS CHRISTIANSON, Plaintiff in Error, vs. THE COUNTY OF KING, Defendant in Error.	ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION. HON. FRANK H. RUDKIN, Judge.

Brief for Plaintiff in Error

TO THE HONORABLE JUDGES OF SAID CIRCUIT COURT OF APPEALS:

This is an action of ejectment brought to recover possession of certain lands in the valley of the Duwamish River, but now within the city limits of the city of Seattle. The original tract contained 160 acres. The defendant has had control of the same since 1869. The present status of the prop-

erty is, that the defendant is using a portion of the tract in connection with its county hospital, which portion is known as the "King County Hospital Grounds;" it is using a portion as a poor farm, which portion is known as the "King County Farm;" it has subdivided a portion, calling it the "King County Addition to Seattle," and has sold off the bulk of that addition in lots; it has subdivided another portion, calling it "King County Second Addition to Seattle," and has sold off a considerable part of that addititon in lots; and the original tract is now traversed by many highways and railroad rights of way. The plaintiff is not seeking to disturb the public or railroad easements acquired in the property, nor the lots sold to innocent purchasers by the defendant. It is only sought to recover the King County Hospital Grounds, the King County Farm, and such lots as are unsold in the King County Additions. The plaintiff also concedes that the defendant may retain as betterments, the valuable buildings put by defendant upon the King County Hospital Grounds.

The amended demurrer to the amended complaint was sustained by the court below, and judgment of dismissal and for costs entered against the plaintiff, who by this writ of error brings that judgment to this court for review.

Consequently the whole case is stated in the amended complaint, which shorn of superfluous verbiage alleges as follows:

I.

That plaintiff is a subject of the king of Norway.

II.

That defendant is a municipal corporation of the state of Washington.

III.

That the property in dispute exceeds in value $300,000.

That the case involves the following grounds of federal jurisdiction:

1. Diversity of citizenship of plaintiff and defendant.

2. The construction of Amendment V. of U. S. Constitution inhibiting the taking of private property for public use without just compensation.

3. The construction of Amendments V. and XIV. of U. S. Constitution, inhibiting the deprivation of property without due process of law.

4. The construction of Sec. 1907, Rev. Stat. U. S. 1874, creating the courts of Washington Territory.

5. The construction of Sec. 1851, Rev. Stat. U. S. 1874, vesting the legislative powers of Washington Territory.

6. The construction of Sec. 1924, Rev. Stat. U. S. 1874, restricting the legislative powers of Washington Territory.

IV.

That in March, 1865, Lars Torgerson died, intestate, being a resident of King County, Washington Territory, and being commonly known by the name of John Thompson.

V.

That prior to his death Lars Torgerson, under the name of John Thompson, acquired title in fee to the 160 acres in question, by deed from Joseph Williamson and William Greenfield. That Williamson and Greenfield acquired title to said land by deed from Luther M. Collins. That Collins acquired title to said land by patent from the United States. That all said conveyances were duly recorded.

VI.

That the heirs of Lars Torgerson were two brothers, one sister and the children of a deceased sister, all Norwegian subjects. That plaintiff is a son of one of the sisters. That all other heirs have conveyed their interests in said land to plaintiff by deed, and he is now sole owner in fee of said land.

VII.

That Lars Torgerson was born at Porsgrund,

Norway, Aug. 30, 1829. That at the age of 21 he shipped as a sailor, and went by way of England to Australia, and thence in 1856 to San Francisco. That at that port he deserted his ship on account of abuse, changed his name to John Thompson to avoid arrest for desertion, came to Elliott Bay neighborhood, and resided until his death in 1865 in Kitsap and King Counties in Washington Territory.

VIII.

That the heirs of Lars Torgerson only learned of his death, of the place thereof, and of his change of name within the last three years. That since learning of the same they have been diligent in collecting proofs of the identity of Lars Torgerson and John Thompson, and of their relationship to him.

IX.

That March 26, 1865, there was filed in the Probate Court of King County, Washington Territory, the following document:

"Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.

Dated March 11, 1865. H. L. Yesler
J. Williamson."

That said document was the only one purporting to be a petition for the appointment of an administrator of the estate of John Thompson ever filed in said court.

That thereupon said court entered the following order:

"Whereas, John Thompson, of the County aforesaid, on the —— day of March, 1865, died intestate, leaving at the time of his death property subject to administration.

"Now, therefore, know all men by these presents, that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.

Dated March 26, 1865. Thomas Mercer,
Probate Judge."

That said order was the only one ever entered in said court purporting to appoint an administrator of the estate of John Thompson.

That May 26, 1868, the County Commissioners of King County, Washington Territory, filed in said probate court a petition, stating they were informed that Thompson's administrator had a large sum of money in his hands; that no heirs had appeared to claim the same; that they believed no heirs were known to exist; that King County was entitled to the balance in the administrator's hands; and praying an order requiring Bagley to account and pay the balance in his hands to the Treasurer of said King County.

That on the day the last described petition was filed there was issued a citation by said court, reciting the contents of said petition, and commanding the administrator to show cause why the orders asked for should not be entered; which citation was served on said administrator on the next day, May 27, 1868.

That July 27, 1868, Bagley filed a report, referring to the said citation; stating that he had been earnestly requested by the countrymen of John Thompson to keep matters in his hands until he could ascertain the whereabouts of the heirs, as they were well assured that heirs were living in Sweden; and asking a continuance until the next term, when if no word was had from the heirs he would turn over the property in his hands to King County, and make a final report.

That Oct. 29, 1868, John J. McGilvra, filed in said court, an affidavit in which he states that he was employed as an attorney by the King County Commissioners, to place the Thompson "estate in such a position that said county to whom said estate by law escheats, may have the full benefit thereof," and asking for the vacation of some order entered at the previous term.

That Feb. 10, 1869, a petition was filed in said court by King County, asking for a removal of Bagley as administrator on various grounds.

That Feb. 12, 1869, Bagley filed his petition, reciting that his final account as administrator had been approved; that the debts of the estate had been paid; that no heirs of John Thompson have been found; and praying he might be discharged, "and that after due notice given and proceedings had, the estate remaining in his hands, as petitioner aforesaid, may be turned over to King County, Washington Territory; or such other or further order made as may be meet in the premises."

That March 29, 1869, an order was entered by said court repeating the recitals of the last described petition of Bagley, and commanding "that all persons interested in the estate of the said John Thompson, deceased, be and appear" before the court, on April 26, 1869, "then and there to show cause why an order of distribution should not be made of the residue of said estate among the heirs of said deceased according to law." That said order was duly published four weeks from April 5, to April 26, 1869, both inclusive.

That May 26, 1869, an order of distribution was entered in said Thompson estate, repeating the recitals of the petition for distribution; reciting a continuance from the day first set by the order published; reciting that the inventory and appraisement, final account, and notice to creditors were all in due form; reciting that the estate had been fully administered and all debts paid; reciting "that said decedent died intestate in the County of King, Washington Territory on the —— day of March, 1865, leaving no heirs surviving him;" reciting "there being no heirs of said decedent, that the entire estate escheat to the County of King in Washington Territory." That said decree then proceeds as follows:

"It is hereby ordered, adjudged and decreed that all the acts and proceedings of said administrator, as reported by this court, and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting the estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore dis-

tributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: The entire estate to the county of King in Washington Territory."

That said decree then proceeds to discharge the administrator from his trust. That the said decree then closes in the following language:

"The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged and decreed, to-wit:

1st. Cash to-wit: $343.83 gold coin.

2nd. And Real Estate, to-wit: One hundred and sixty acres of land on Duwamish River in King County, W. T. more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson dated January 19th, A. D. 1865, and recorded in Volume 1 of Records of King County, W. T., on Pages 458, 459 and 460.

3rd. A Lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid."

That said decree is null and void; that said probate court was wholly without jurisdiction to vest, transfer, convey, fix or pass upon the title to said land and had no power or authority to declare the same escheated.

That all of defendant's claims to said land, acts done in reference to said land, and control exercised over said land have been under and by virtue of said null and void decree.

That the defendant has not, and never has had any contract, deed, conveyance, decree, judgment, nor any other writing, record or document evidencing or purporting to evidence any title on its part in or to said land.

That neither the defendant, nor any other public officer or authority has ever instituted any suit or legal proceeding to escheat said land.

That neither the defendant, nor any other public officer or authority has ever instituted any suit or legal proceeding to have any title the defendant might have in said land quieted or confirmed.

X.

That since the entry of said decree of distribution said land has been marked on the county assessor's rolls as exempt from taxation as county property.

That about 1885 the territorial County of King occupied a certain portion of said land generally known as the "King County Farm," and since the organization of the State of Washington the defendant has succeeded to such occupancy; that the same has not been used for any county purposes, but has been let out to tenants for the purpose of producing a monetary income for the defendant.

That about the year 1900 the defendant occupied a portion of said land generally known as the "King County Hospital Grounds," and has since been using

the same for county hospital purposes, having placed thereon a valuable hospital building with its appurtenances.

That in 1892 the defendant subdivided a portion of said land calling the same the "King County Addition to Seattle," and has sold off all of the same to private parties, except 13 lots in said addition.

That in 1903 the defendant subdivided a portion of said land calling the same "King County Second Addition to the City of Seattle," and has sold off about half of the same to private parties.

XI.

That the King County Farm, King County Hospital Grounds and two King County Additions together constitute the tract of 160 acres which was the property of Lars Torgerson; but a number of highways and railroad rights of way now cross the same.

XII.

That the plaintiff is entitled to all betterments placed upon said land prior to 1903, but hereby expressly waives all claim to the same, and admits that the defendants may be re-imbursed for the same under the law, in the same manner as if the same had been made on said land since 1903.

PRAYS that plaintiff may recover possession of land composing the King County Farm, the King Coun-

ty Hospital Grounds, and the unsold portions of the King County Additions still in the control of the defendant; and for the costs of suit.

THE AMENDED DEMURRER states six grounds as follows:

"1. That the plaintiff has no legal capacity to maintain this action.

"2. That the said complaint does not state facts sufficient to constitute a cause of action against the defendant.

"3. That said action has not been commenced within the time limited by law therefor.

"4. That said complaint shows upon its face that the plaintiff has been guilty of laches and of procrastination in the bringing of said action.

"5. That the Court has no jurisdiction over the person of defendant, or over the subject matter of said action.

"6. That plaintiff's complaint shows that plaintiff by his own acts, deeds and omissions, is now estopped from bringing and maintaining this action or from asserting any right, title or interest in and to the property described in said complaint."

The grounds of (1) "No capacity of plaintiff to sue," and (5) "No jurisdiction of court over person or subject matter," are certainly not stated seriously.

The ground of (2) "General demurrer," almost comes in the same category, because as the plaintiff deraigns a good title in fee from the United States Government, and alleges that the defendant is in possession of the land in question without any claim of title save under a void order of court, certainly he states a good cause of action in ejectment.

The foregoing grounds were not discussed in the Court below, and we shall assume they are not going to be in this Court. This only leaves three grounds of demurrer to be considered, which are, (3) "The Statute of Limitations;" (4) "Laches," and (6) "Estoppel."

ASSIGNMENT OF ERRORS.

1. The Court erred in sustaining the defendant's amended demurrer to the plaintiff's amended complaint.

2. The Court erred in not overruling the defendant's amended demurrer to the plaintiff's amended complaint.

3. The Court erred in not requiring the defendant to answer the amended complaint of the plaintiff.

4. The Court erred in rendering and entering the judgment in the above entitled action dismissing the action of the plaintiff.

ARGUMENT.

I.

NO FACTS ON WHICH TO BASE LACHES AND ESTOPPEL ARE SHOWN IN THE COMPLAINT, NOR COULD THEY BE SET UP AS DEFENSES TO THIS ACTION.

(A) We take the liberty of citing to the Court

the following recognized definitions of Laches and Estoppel:

"LACHES is a neglect to do what in the law should have been done for an unreasonable or unexplained length of time under circumstances permitting diligence."

24 Cyc., p. 840.

"ESTOPPEL is, where one voluntarily, by his words or conduct, caused another to believe the existence of a certain state of things, and induced him to act on that belief, so as to alter his previous condition for the worse, in that case the former is concluded from averring against the latter a different state of things as existing at the same time."

Fetter, on Equity.

ESTOPPEL BY SILENCE: "To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth, and have been misled into doing that which he would not have done but for such silence. In other words, when the silence is of such a character and under such circumstances that it would become a fraud upon the other party to permit the party who has kept silent to deny what his silence has induced the other to believe and act upon it will act as an estoppel."

16 Cyc., p. 759.

FAILURE TO ASSERT TITLE OR RIGHT: "Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his right and fails to assert his title or right, he will be estopped afterward to assert it; but

it must appear that it was his duty to speak, and that his silence or passive conduct actually misled the other to his prejudice."

16 Cyc., p. 761.

The facts shown in the complaint can not possibly bring this case within any one of these definitions. Laches and estoppel are one and the same in principle, the only difference being that the former is based on acts of omission, and the latter on acts of commission. The heirs of Lars Torgerson knew absolutely nothing of the facts out of which this case arises, until within three years last past. The defendant knew all about the facts, even to the point of knowing that Torgerson had heirs somewhere in those countries composing Scandinavia The heirs of Torgerson never did anything on which the defendant based any of its acts, because they did not come in contact with the defendant and did not know of its existence. The defendant did know there were such persons as the heirs, and attempted to appropriate their property without their knowledge. If there is any fraud shown here, it is on the part of the defendant. We could cite the court to almost innumerable cases, but will cite only one, because of its resemblance to the case at bar, in lack of knowledge on the part of the plaintiff, and in the fact that it was a county trying to appropriate property that did not belong to it.

In *Young vs. Board of Commissioners,* 51 Fed. Rep. 585, a suit was brought in ejectment to recover possession of certain land which had been dedicated as

a cemetery by the father of the plaintiff. The plaintiff had been away from the city in which the land was located for 40 years, and upon his return found that the cemetery use had been abandoned, and that for ten years before his return a county court house had been standing on the land. Taft, Judge, in his opinion, says:

"This is an action at law. The form of procedure is under the code of Ohio, but the remedy is substantially that of ejectment at common law. Plaintiff must recover, if at all, on his title as it is. If equitable remedies are needed to perfect his right to possession, he fails. In like manner, only defenses at law are available here. The defense of estoppel *in pais,* pleaded in the answer, would seem to be of equitable cognizance, and hardly to be urged or considered here. However that might be, if it were a valid plea, there is no evidence to support it, because the court house was erected 10 years before the plaintiff (who was not in Youngstown from 1848 to 1888) knew anything of the abandonment of the burying ground or its subsequent use for general county purposes."

In the case at bar there is absolutely nothing in the complaint to render applicable the principles of Laches or Estoppel.

(B) But even if this complaint did show grounds for the application of the equitable doctrines of laches and estoppel, they could not be utilized as defenses to this legal action of ejectment. Whatever may be allowable under the code of Washington, as to pleading equitable defenses to actions at law, it can not be done in the federal courts.

"The difference between causes of action at law

and in equity is matter of substance, and not of form. In the national courts the ineradicable distinction between them is sedulously preserved in the forms and practice available for their maintenance as it is in the nature of the causes themselves and in the principles on which they rest. A legal cause of action may not be sustained in equity, because there is an adequate remedy for the wrong it presents at law, and it is only where there is no such remedy that a suit in equity can be maintained. Equitable causes and defenses are not available in actions at law, because they invoke the judgment and appeal to the conscience of the chancellor, and the free exercise of that judgment and conscience is forbidden in actions at law by the rule which entitles either party to a trial of all the issues of fact by a jury. In the federal courts an action at law cannot be maintained in equity, nor is an equitable cause of action or an equitable defense available at law. *Bagnell v. Broderick,* 13 Pet. 436, 10 L. Ed. 235; *Foster v. Mora,* 98 U. U. 425, 428, 25 L. Ed. 191; *Scott v. Armstrong,* 146 U. S. 499, 512, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Linsay v. Bank,* 156 U. S. 485, 493, 15 Sup. Ct. 472, 39, L. Ed. 505; *Schoolfield v. Rhodes,* 82 Fed. 153, 155, 27 c. c. a. 95, 97; *Davis v. Davis,* 72 Fed. 81, 83, 18 C. C. A. 438, 440."

Highland Boy G. M. Co. vs. Strickley, 116 Fed. 852.

To like effect are:

City of New Orleans vs. L. Construction Co., 129 U. S. 45;
Robinson vs. Campbell, 3 Wheat. 212;
Doe vs. Aiken, 31 Fed. 393-395;
Hickey vs. Stewart, 3 How. 750-759;
Singleton vs. Tanchard, 1 Black 342;
Newman vs. Jackson, 12 Wheat. 570-572;
Burnes vs. Scott, 117 U. S. 582-587.

This we believe disposes of the questions of laches and estoppel as far as the case at bar is concerned.

II.

THE TERRITORIAL COUNTY OF KING, TO WHOSE TITLE, IF ANY, THE DEFENDANT SUCCEEDS, NEVER ACQUIRED ANY TITLE TO THE LAND IN QUESTION BY ESCHEAT.

By virtue of certain provisions of the Constitution of Washington, the defendant succeeded to all rights of the County of King, of Washington Territory; which it is unnecessary to cite, unless this statement should be challenged. Lars Torgerson, then passing under the name of John Thompson, died in March, 1865. The County of King (a Territorial Municipality) laid claim to his estate in the Territorial Probate Court which was administering the same and that Court entered an order assuming to give it to the County, and that County, and its successor, the defendant, have retained control of the land involved ever since. There was at the time of Thompson's (by which name we will call him, now that we must discuss the probate records in which he is so designated) death a law in the territory assuming to give escheated lands to the county in which they were located. The county claimed the land under this law. We insist that said land never escheated to the County of King for the following reasons:

A. The Territory was not a Sovereign, but a municipal corporation.

B. The Organic Law of the Territory conveyed to it no property rights of the United States.

C. The territorial legislative act giving escheated property to the counties trenched upon the primary disposal of the soil in a manner forbidden by the Organic Law.

D. The territorial legislative act giving escheated property to the counties was invalid under the Organic Law because its title was not broad enough to cover the subject matter.

E. There was never any Office Found.

A.

Kent's definition of escheat (4 Com. 423) is:

"When the blood of the last person seized became extinct, and the title of the tenant in fee failed, from want of heirs, or by some other means, the land resulted back, or reverted to the original grantor, or the lord of the fee, from whom it proceeded, or to his descendants or successors."

The Territory never owned this land, and so it could not revert to it as the original grantor from whom the title proceeded. It could not take it as lord of the fee or sovereign, because it was not a sovereign. There have been many definitions given of a territory, but they all resolve themselves down to a statement, that a territory is a sub-government established to assist the sovereign in administering the government; or to use the common designation of such a sub-government, a municipal corporation.

The United States was the original owner of the soil *in allodium,* and also the Sovereign. It comes within both of the descriptions in the definition of the person who should take in case of escheat.

Under our system of government all property that escheats in a territory, goes to the United States.

Williams vs. Wilson, Martin & Yerger (Tenn.) 248, was a case where one, Johnston, died the owner of certain lands, but being an alien. The land in question was situated in that territory which formerly belonged to North Carolina, but was ceded by that state to the United States in 1789, and in which was organized the Territory of Tennessee. Johnston died before the State of Tennessee was admitted. The Court in speaking of this matter says:

"All lands which might escheat after the cession act would of course escheat to the sovereign power, the government of the United States until the formation of our constitution, and afterwards to this government."

The Supreme Court of Alabama in *Etheridge vs. Doe,* 18 Ala. 565, cite *Williams vs. Wilson* with approval.

The Supreme Court of Montana concurs in this view in *Territory vs. Lee,* 2 Mont. 124.

The Supreme Court of Iowa does the same in *King vs. Ware,* 4 N. W. 858.

The Supreme Court of the United States does like-

wise in *Church of Jesus Christ of Latter Day Saints vs. United States*, 136 U. S. 1.

If then there was any escheat at all, it did not pass the title to the Territory or its counties, but there was a reversion to the United States. The County of King and its successor have been squatters on the public domain, and could acquire no title whatever which they can set up against us. We can show a title from the United States which will protect us against any attack from them, but the County can show no title whatever. It is a mere squatter or trespasser.

B.

The right to take back escheated lands by reversion, upon failure of heirs of the last tenant in fee, was a property right belonging to the United States, and there was no way for it to get into the territory, or its grantees, unless the United States had in some way conveyed or granted it to the territory. If a new state were brought into existence with full sovereign power, all rights and incidents of sovereignty would vest in it, except such as remained in the general government as part of its powers under the constitution. But the organization of a municipality for governmental purposes, would not vest such municipality with any property rights of the United States, unless expressly given to it. No conveyance or grant of such rights can be found. No warrant for the territory's action in assuming to claim these reversionary rights in land, and

transfer them to its counties, can be found unless it be derived from the grant of legislative powers to the territory contained in Sec. 1851, Rev. Stat. of U. S. 1874, which is as follows:

"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

This is a grant of law making power, pure and simple. It is no conveyance of property rights. On the contrary, it mentions the property of the United States, and commands the territory not to meddle with it. It forbids it to interfere with the primary disposal of the soil, and forbids it to attempt to tax the federal property. The escheat of lands was a subject matter which neither the territory, nor any of its branches, executive, legislative or judicial, had any power to interfere with.

C.

Let us argumentatively concede that the act of the territory giving escheated property to its counties was not a high-handed attempt to confiscate federal property, but was the passage of a law. Nevertheless, it was one of the laws which the territory was by its Organic Law expressly forbidden to pass. The grant of legislative powers, which we have above set out, specifi-

cally provides, "no law shall be passed interfering with the primary disposal of the soil."

When the United States as owner of the land *in allodium* granted an estate in fee, in case there was a failure of heirs of the tenant in fee, the land would revert to the United States. The United States would not take under the decedent, for his title had ceased, had become extinct. It would again hold the land by its original right *in allodium,* and when it again granted the land to another tenant, such re-grant would be a primary disposal of the soil, a grant emanating from the original owner *in allodium.* Any law passed by the territory the effect of which would be to cut off the reversion, and divert it from the United States to the territorial counties, and prevent a new disposal of the same by the United States, would certainly be an interference with the primary disposal of the soil.

This view of the law is very clearly stated by the Supreme Court of Montana, in *Territory vs. Lee,* 2 Mont. 124. In this case the Territory of Montana had assumed to pass a law, whereby it was provided that all mining claims which were acquired by aliens should escheat to the Territory. It is true, that these mining claims were only easements in the land, but, in principle, there is no difference between an easement and the entire usufruct, both are real property. The same estates can be created in each. There can be an estate in fee in an easement, and an estate in fee in the entire usufruct of the land, and the same principles would apply as to their being escheated.

In this case the court says:

"The Territory had no interest whatever in the claims, held by aliens or by any other persons, and no title nor shadow of title thereto, but by the operation of this statute the Territory becomes the owner of the possessory title which is or may be the entire equitable interest, and is authorized to sell the same for its own use, so that, by force of this statute, it becomes the owner of property in which it never had any interest and which never belonged to it, and it forfeits the property of an alien and calls it its own, while if any forfeiture takes place for any reason whatever, the property thus forfeited necessarily belongs to the United States. The Territory can not acquire title to property that does not and never did belong to it, so easily as this."

"Is this statute in harmony with the Organic Act of the Territory?"

"The Organic Act provides, section 6, that the territorial legislature shall pass no law interfering with the primary disposal of the soil. Notwithstanding the Organic Act whereby a temporary government is created for the Territory, the general government being the owner of the soil, still retains its ownership, and has made all the necessary laws and regulations directing how its property shall be disposed of, and how title thereto shall be conveyed. The Territory can enact no valid law that, in any manner, impedes, modifies or varies the operation of the laws of the general government as to the disposal of its lands. Neither can the Territory do, by indirection, what it is prohibited from doing directly, so that, if any Territorial statute, enacted for a local, or for a temporary purpose, in its workings, in its operations and effects, defeats the laws of congress as to the disposal of the public lands of the territory, such statute is necessarily void. The statute in question provides that the mining claims held by aliens shall be forfeited to the Territory, so that the Territory becomes the owner of the possessory title to such claim. Laying

aside the fact that the Territory thus becomes the owner of property that does not belong to it, yet it obtains possession of the title, and this possession necessarily interferes with the disposal of the soil by the United States to the citizen or settler. If the possessory title is forfeited, the property should again become subject to location by the persons entitled to make such location, but the Territory comes forward and says, by its legislature, "that although the title to this property is forfeited, and it thereby becomes subject to entry and location, yet I have acquired this property, and if anyone obtains possession of it they must purchase of me."

In *King vs. Ware,* 4 N. W. 858, (Ia.) the court had occasion to construe this inhibition against interference with primary disposal of the soil in a case where such inhibition was a part of the Organic Law of the State of Iowa. The Enabling Act under which the states of Iowa and Florida were admitted to the Union in 1845, imposed such an inhibition upon the states, and required them to irrevocably pledge themselves to obey the inhibition. The state of Iowa passed an act thus pledging itself in 1849.

This case does not in its facts, resemble the case at bar, but it does enunciate the principle that a law seeking to cut off from the United States the reversion of escheated lands, is one interfering with the primary disposal of the soil. In this case an alien had acquired certain lands from the United States by patent. After his death, it was sought to claim that the property had escheated to the state of Iowa by virtue of an act of that state forbidding aliens to hold land. The court says:

"It was not within the power of the state to question his title by escheating the lands." The application of this principle in this case is much stronger than what we are asking in the case at bar. In the case at bar, the inhibition was laid upon a Territorial government, which was not presumed to have any other powers than those specifically delegated to it, and which was not a sovereign. In the Iowa case, the inhibition was laid upon a sovereign state which would be presumed to have all powers of government except such as were forbidden to it by its Organic Law.

It seems to us that it is beyond dispute that the passage of the escheat law by the territory of Washington, was an interference with the primary disposal of the soil by the United States Government.

D.

Congress saw fit to place certain restrictions upon the legislative power of the territories, and these are to be found in Sec. 1924, Rev. Stat. of U. S. 1874. These restrictions do not concern the question now under discussion, and so we will not enumerate them. The section closes with the following language:

"To avoid improper influences, which may result from intermixing in the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

A similar provision is to be found in the Constitution of almost every state in the Union, and while some courts have been very strict and some very liberal in construing the title of acts, still all agree that when a portion of an act is entirely foreign to the object of the title, the same must be held invalid. If such portion is not severable from the remainder of the act, the whole act falls. If it is severable from the remainder of the act, and its absence does not render inoperative the remainder of the act, then such portion falls, and the remainder of the act stands. These principles which we have stated, are announced in reference to the Constitution of the state of Washington in *Bradley E. & M. Co. vs. Muzzy,* 54 Wash. 227, which refers to, and is based upon *Harland vs. Territory,* 3 Wash. Ter. 131, where they are laid down in reference to the identical Organic Law which is now under consideration.

The Probate Act of Washington Territory, originally passed in 1854, was re-enacted with little change in 1860. It will be found in the Wash. Sess. Laws 1859-60, pp. 165-237. The title of the act is:

"AN ACT DEFINING THE JURISDICTION AND PRACTICE IN THE PROBATE COURTS OF WASHINGTON TERRITORY."

It is divided into eighteen chapters, sixteen of which seem to properly refer to the jurisdiction and practice of the Probate Courts, but Chapters 2 and 14 have nothing to do with the title of the act. Chapter 2 is in reference to the making and construction of Wills, and has

absolutely nothing to do with the jurisdiction and practice of the court. In like manner Chapter 14 regulates the descent of real estate, and also has absolutely nothing to do with the jurisdiction and practice of the court. This chapter 14 names those who shall successively inherit the real property of a decedent who dies intestate, and at its end, provides for an escheat of property to the county in case there is a failure of heirs. The opening and conclusion of this chapter are in the following language:

"When any person shall die seized of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts as follows:" * * * "8th. If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

This Chapter 14 regulating the descent of real property, can be completely severed from the remainder of the act, and as it treats of a subject matter and object which cannot by any possible construction come within the title of the act, it must fall and be held to contravene the Organic Law. The remainder of the act still composes a consistent whole, and therefore is not injured by the insertion of this improper but distinct matter. This is the only provision in the territorial laws in reference to what shall become of escheated property, and if it is invalid, as is the case, it simply leaves the common law on that subject in force. Under that, the sovereign, the United States, would take all such

lands by reversion. It does not seem to us as though the question of the invalidity of this act under the Organic Law, could be called even debatable.

E.

As a matter of fact this property never did escheat. At the time of his death Lars Torgerson, alias John Thompson, left surviving him in Norway, two brothers, one sister and the children of a deceased sister, and a son of one of his sisters claiming in his own right as heir and as grantee of the interest of all the other now living heirs, stands now before this court in the person of the plaintiff, demanding possession of the lands which belonged to his uncle at the time of the latter's demise. All the heirs of Torgerson, alias Thompson, living at the time of his death, were subjects of the King of Sweden and Norway, and the plaintiff who brings this suit, is the same. Although these heirs were aliens, they were able to inherit. More than a year before the death of Torgerson, alias Thompson, the legislature of the territory of Washington (Sess. Laws 1863-4, p. 12) passed "An Act to enable aliens to acquire and convey real estate," and which was in the following language:

"Section 1. BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF WASHINGTON, That any alien may acquire and hold lands, or any right thereto, or interest therein, by purchase, devise or descent; and he may convey, mortgage and devise the same, and if he shall die intestate, the same shall descend to his heirs, and in all cases such lands shall be held, conveyed, mortgaged or

devised, or shall descend in like manner and with like effect as if such alien were a native citizen of this territory, or of the United States."

Sec. 2. The title to any lands heretofore conveyed shall not be questioned, nor in any manner affected by reason of the alienage of any person from or through whom such title may have been acquired."

But these heirs also claim by a higher right. The first Treaty ever made by any foreign government with the United States of America was concluded April 3, 1783, with Sweden and Norway, and the same was extended by a new Treaty entered into July 4, 1827. By Article VI of this Treaty, it is provided that the subjects and citizens of the contracting parties, shall be allowed to inherit property in the countries of each other. That this Treaty covers real estate, has been held by the Supreme Court of Washington in the case of In re Sixtud's Estate, 58 Wash. 339, and the same construction has been put upon this Treaty by the Supreme Court of Illinois in Adams vs. Akerland, 49 N. E. 454.

But though as a matter of fact there never really is any failure of heirs, because every person must somewhere on the globe have blood relatives, still there is such a thing as failure of heirs as a matter of law. The sovereign power can take steps in its own courts to have it judicially determined that there are no heirs, which proceeding has in the English law the name of "office found." When there has been such an official determination that heirs cannot be found, then the natural presumption of heirship is destroyed, and thereupon

the reversion to the sovereign is legally effected; though when it has thus been effected, such action relates back to the time of the tenant's death, and the sovereign can claim all property rights that have enured since that time. But until there has been "office found," no lands can escheat. At the time of the death of Torgerson, alias Thompson, there was a law in the territory of Washington providing a procedure for escheating property. Of course we claim that all laws on the subject of escheat passed by the territory are nullities, but for the sake of argument, admitting that the territory could claim escheated property, it was not done properly in accordance with its own laws in reference to the land involved in the case at bar. This method of procedure is fixed in the Civil Practice Act of the Territory, Chapter 52, Sec. 480, Session Laws 1854, page 218, which is as follows:

"Whenever any property shall escheat or be forfeited to the territory, for its use, the legal title shall be deemed to be in the territory, from the time of the escheat or forfeiture; and an information may be filed by the prosecuting attorney in the district court, for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in a civil action for the recovery of property."

The sovereign does not take escheated property as a successor to the decedent. For failure of heirs the title of the decedent ceases and terminates; the original title of the sovereign revives and the title of the sovereign is based upon its original ownership, and not upon the

ownership of the decedent. This seems almost too axiomatic to need a citation of authorities, and we will refer the court to only a couple of the numerous ones that exist:

"In no proper sense, we apprehend, can the State be styled an heir, when, in the absence of heirs of every denomination by law capable of succeeding by inheritance, the property of the deceased owner becomes vested in the public, and is at the disposal of the government." * * * "The State is not in reality an heir or a successor, in the technical sense of this word, for it acquires by the title of escheat; that is to say, precisely in virtue of a title which supposes, necessarily, that there are no heirs; which caused Bacquet to say that, when a man dies without heirs, the goods left by his death *non vocantur bona hereditarea sed vacantia nominantur.* In a word, the State exercises in this matter the eminent right of sovereignty, in virtue of which it appropriates all property without a master which is found within its territory." State vs. Ames, 23 La. Ann. 69-71.

"The state, however, does not come in by way of succession, but in the event of the absence of all who are entitled to come in by succession, whether the property be real or personal, it goes to the state by escheat." In re Minor's Estate, 76 Pac. 968 (Cal.)

That it is necessary to have a proceeding of "office found" before title to escheated lands can re-vest in the sovereign, has been held by every court that has had occasion to pass upon this question.

"It seems very clear that, in every case of a failure of succession for want of heirs or kindred of the decedent, an action of escheat becomes necessary to vest the title in the state, whether the estate so escheated consists of real or personal property. And this is the view heretofore expressed by this Court in *People vs. Roach,* 76 Cal. 294; 18 Pac. 407."

In re Minor's Estate, 76 Pac. 968 (Cal.)

"But where a subject dies intestate, as the estate descends to collateral kindred indefinitely, the presumption of law is that he had heirs, and this presumption will be good against the Commonwealth until they institute the regular proceedings by inquest of office, by which the fact whether the intestate did or did not die without heirs, can be ascertained, and if this fact is established in favor of the Commonwealth, it rebuts the contrary presumption, and the Commonwealth, by force of the judgment, and of the statute before cited, become seized in law and in fact. In such case therefore, the Court are of opinion, that an inquest of office is necessary, and that the Commonwealth cannot be deemed to be seized, without such inquest. *Jackson vs. Adams,* 7 Wend. 367; *Doe vs. Redfern,* 12 East 96."

Wilbur vs. Tobey, 33 Mass. 177-180.

"Land is not escheatable as long as there are heirs of the original tenant or grantee.

Escheat is that possibility of interest which reverts to, or devolves on the lord, upon the failure of heirs of the original grantee; and he cannot grant the land again until that event happens; and if he does, his grant will pass nothing, and cannot impair any right or interest acquired under his original grant."

Hall vs. Gittings, 2 Har. & J. 112-125 (Md.)

"When the owner of real property dies intestate without heirs capable of inheriting it, the title thereof devolves, by operation of law, upon the state. Yet, when thus acquired, the state cannot make its title available without first establishing it in the manner prescribed by law. This is done by the institution of a purchase proceeding in the proper court, in the name of the people, for the purpose of proving and establishing by a judicial determination title in the state. The facts essential to the existence of the state's title are specifically set forth in the statute, and must be clearly proven on the hearing. The proceeding is in the nature of an inquest of

office, and the record of it is the only competent evidence by which a title by escheat may be established."

Wallahan vs. Ingersoll, 7 N. E. Rep. 520. (Ill.)

"Helme stood in the same condition, in this respect, as any other citizen of the State; if any natural born citizen dies without heirs, his lands escheat, but the State has no right to enter and take posession until office found, and any grant that they may make of such lands, whether by patent or otherwise, can convey no title, because, until office found, the State had no title, as every man is presumed to have heirs, until the contrary is shown."

Jackson vs. Adams, 7 Wend. 367. (N. Y.)

"By the civil as well as the common law, the King cannot take upon himself the possession of an estate said to have been escheated, until the fact is judicially ascertained by a proceeding in the nature of an inquest of office."

People vs. Folsom, 5 Cal. 379.

To like effect are:

Peterkin vs. Inloes, 4 Md. 175;
University vs. Harrison, 90 N. C. 385;
Chatham vs. State, 2 Head. (Tenn.) 553;
People vs. Fire Ins. Co., 26 Wend. 218;
Hammond vs. Inloes, 4 Md. 138;
Wideranders vs. State, 64 Tex. 133.

This Washington statute specifically provides what officer shall procure the escheated property; what form of action he shall utilize; what court he shall bring action in, and that in regard to other matters he shall look to the common law. The court in which the prosecuting attorney is directed to file his information, is the district court of the territory, which was the court of general

common law and chancery jurisdiction, and not the probate court of the territory, which was a court of limited jurisdiction, and in which the proceedings shown in the case at bar were had. No such proceeding as is required by the statute of the territory was ever brought to escheat the lands involved in this case. Furthermore no legal proceeding of any kind to quiet title or procure title for the defendant were ever brought by it or any public officer for it which might possibly have been construed to have been a substitute for an escheat proceeding. Therefore the land in question was never escheated as a matter of law.

For the foregoing five reasons which we have stated under the sub-headings A. B. C. D. and E., we insist that the land in question in this case was never escheated, and neither the defendant in the case at bar, nor its predecessor, the territorial county of King, ever acquired any right, title or interest by escheat.

III.

THE PROCEEDINGS IN THE TERRITORIAL PROBATE COURT WERE IN LEGAL EFFECT AN ABSOLUTE NULLITY.

The Probate Court of the Territorial King County had no jurisdiction whatever over matters of escheat, and if it had had, the proceedings shown in this record were jurisdictionally defective; for the following reasons:

A. The Organic Law did not grant such jurisdiction to the Probate Court.

B. The Organic Law forbade any Territorial Court from interfering with the primary disposal of the soil.

C. The Territorial Act which assumed to give the Probate Court jurisdiction of escheats was invalid under the Organic Act, because of insufficient title.

D. The Territorial Act defining the jurisdiction of the Probate Court did not cover escheats.

E. The proceedings which were had, were under the Territorial law insufficient to give jurisdiction.

F. The proceedings which were had in the Territorial Probate Court were not due process of law.

A., B. and C.

These same three grounds were above given as reasons why the legislative branch of the territorial government could not pass any law escheating lands to the territorial counties. It follows as a necessary corollary that if the legislative branch of the government could not enact any laws upon a subject matter, that the judicial branch of the government could not possibly have any power over the subject matter of construing such laws. Therefore the territorial Probate Court of King County had no jurisdiction over the matter of the escheat of lands to the territory or its counties.

D.

The judicial power of the territory of Washington was by act of Congress (Sec. 1907 Rev. Stat. of U. S. 1874) vested in a Supreme Court, District Courts, Probate Courts and in Justices of the Peace. The Organic Act of the territory in Sec. 9 (Session Laws 1854, p. 36) provides as follows:

"The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace shall be as limited by law;" "and the said supreme and district courts respectively shall possess chancery as well as common law jurisdiction."

The probate courts are not otherwise mentioned in the Organic Act. It will thus be seen that the district court was the court of general common law and chancery jurisdiction, and that the probate court was a court of limited jurisdiction, as its name alone would imply. The legislature in the probate act of the territory to which we have above referred, defined the jurisdiction of the probate court. The provision on this subject is found in Sec. 3, chap. 1, of the Probate Act (Sess. Laws 1859, pp. 165-237. and is in the following language:

"Sec. 3. That the probate court shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same: the appointment and displacing guardians of orphan minors, and of persons of unsound mind, and the binding of apprentices: in the settle-

ment and allowance of accounts of executors, administrators and guardians; to hear and determine all disputes and controversies respecting wills, the right of executorship, administration and guardianship, or relative to the duties and accounts of executors, administrators and guardians; and to hear and determine all disputes and controversies between masters and their apprentices; to allow and respect claims, against estates of deceased persons as hereinafter provided; to award process, and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators or guardians, or otherwise, shall be entrusted with, or in any wise accountable for any lands, tenements, goods or chattels, belonging to any minor, orphan, or person of unsound mind, or estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction."

If these provisions be examined with a miscroscope, it would not be possible to find a single microbe of jurisdiction over escheats. Besides not only the District Court, which was the Court of general common law and chancery jurisdiction, would on that account have jurisdiction over escheat proceedings, but also a statute of the territory which we have above set out in full, and which is found in Section 480, Chapter 52, Session Laws 1854, p. 218, expressly provided that such proceedings should be brought by information filed by the prosecuting attorney in the District Court. Therefore under the written law of the territory, if any of its courts did have jurisdiction over escheat matters, it would not be the Probate Court which assumed to escheat the prop-

erty involved in the case at bar. The proceeding in the Probate Court was *coram non judice.*

As we have above shown, citing authorities, the county in claiming escheated property, would not be claiming through or under the decedent. The title of the heirs of Lars Torgerson would be traceable through a chain of conveyances from the United States, and the claim of the County would be that it was the successor to the United States as to the reversionary right of escheat. So these two claims would be distinct and disconnected, though tracing from the same source. That a Probate Court has not got jurisdiction to settle any claims to property made by persons not claiming by, through or under the decedent, seems so self-evident that it ought not to require the citation of authorities. However we refer the court to a few, in the first of which the court was construing the powers of this same territorial probate court of Washington.

"While it is true that the probate court has jurisdiction to determine the claims to property as between those interested in the estate, this authority only goes to the extent of determining their relative interests as derived from the estate, and not to an interest claimed adversely thereto."

Stewart vs. Lohr, 1 Wash. 341- 343.

"The powers of the Superior Court in respect to its probate jurisdiction are the same as they would be if it were in fact a separate probate court. Proceedings in probate matters, in actions in equity, and at common law are distinct, and should not be intermingled except in cases specially authorized by law. Regarding the

Jurisdiction of probate courts, Judge Works, in his valuable work on the Jurisdiction of Courts (at pages 432, 433), says:

" 'And where probate jurisdiction is vested in courts of general jurisdiction, it is usually held that proceedings in probate must be treated as distinct from its law and equity jurisdiction, and as if it were a separate and distinct court of probate.' "

In re Alfstad's Estate, 27 Wash., p. 176-182.

"It is next argued that the probate court had no power in this proceeding to determine the title of third parties claiming the fund in question. This court held in *Stewart vs. Lohr,* 1 Wash. 341 (25 Pac 547. 22 Am. St. Rep. 150) that the probate court is without jurisdiction to try the title to property as between the representatives of an estate and strangers thereto. See, also *Huston vs. Becker,* 15 Wash. 586 (47 Pac. 10), and In re Alfstad's Estate, 27 Wash. 175, (67 Pac. 593.) Under these decisions the superior court sitting in probate had no jurisdiction to determine the title of third parties claiming the fund."

In Re Belt's Estate, 29 Wash., p. 535-540.

"We see nothing in the allegations of the parties, nor in the evidence adduced, which could enable the court of probates to take cognizance of the case. That court is the proper one to make a partition of a succession, where the parties claim as heirs or legatees; and no defence is made under another title, or in a different capacity. In the present case, if the minor heirs had wished to make a division of effects which they held in common, they would have been before the proper tribunal; but the object is to recover from a party who claims adversely to them and to their ancestor, and the ordinary courts can alone settle that question."

Harris' Tutor vs. McKee, 4 Mart. (N. S.) 485 (La.)

It will thus be seen that the proceedings of the Probate Court of the territory which appear in this record assuming to escheat the property in question were an absolute nullity because the Court was without jurisdiction.

E.

Admitting argumentatively, that the territorial probate court had the power in the course of probate proceedings, to enter a final order escheating property of the decedent, still in the case at bar, the whole of the probate proceedings would be null and void, because under the law of the territory as it was then framed, the probate court did not acquire jurisdiction over the estate of John Thompson at the beginning of the probate proceedings, and so all subsequent proceedings were null and void. We assume that it will be conceded that the territorial probate court was a court of limited jurisdiction; that all proceedings of a court of limited jurisdiction must show the facts necessary to its jurisdiction upon the face of its records or its proceedings will be void, and that when a statutory method of procedure is provided it must be followed, or such proceedings will be void. Decisions in support of these propositions could be cited from every state in the Union, and though the decisions in most cases are constructions of the specific written law of the respective states, still they are unanimous in enunciating these principles.

The petition for letters of administration and the order appointing the administrator in the case at bar,

are so deficient that the whole proceedings based upon the same are null and void, the court never having obtained jurisdiction over the estate of John Thompson, alias Lars Torgerson.

Section 90 of the Probate Practice Act of the Territory (Sess. Laws 1859, p. 182) prescribing the method of obtaining letters of administration, states the requirements of the petition in the following language:

"Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the probate court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will."

In reference to these jurisdictional requirements, two questions arise, namely, the venue of the administration and the person entitled to take out administration.

In regard to the first, the law of the territory (Sess. Laws 1859, p. 173) was as follows:

"Sec. 43. Wills shall be proved and letters testamentary or of administration shall be granted.

1st. In the county of which the deceased was a resident, or had his place of abode at the time of his death.

2d. In the county in which he may have died, leaving estate therein, and not being a resident of the territory.

3d. In the county in which any part of his estate may be, he having died out of the territory, and not having been a resident thereof at the time of his death.

Sec. 44. When the estate of the deceased is in more than one county, he having died out of the territory, and not having been a resident thereof at the time of his death, the probate court of that county in which application is first made for letters testamentary or of administration shall have exclusive jurisdiction of the settlement of the estate."

In regard to the second, the law of the territory (Sess. Laws 1859, p. 181) was as follows:

"Sec. 89. Administration of the estate of a person dying intestate, shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the order:

1st. The surviving husband, or wife, or such person as he or she may request to have appointed.

2d. The children.

3d. The father or mother.

4th. The brothers.

5th. The sisters.

6th. The grand children.

7th. Any other of the next of kin, entitled to share in the distribution of the estate. Provided, That nothing hereinbefore mentioned shall be so construed as to prevent the judge of probate from appointing any disinterested and competent person or persons to administer such estate, when requested so to do, by petition of any person or persons interested in a just administration thereof."

The only petition for letters of administration filed in the Thompson estate was as follows:

"Petition to the Honorable Probate Court:

I would most respectfully ask to have Mr. Daniel Bagley appointed administrator of the estate of John Thompson, deceased.

Dated March 11, 1865. H. L. YESLER,
J. WILLIAMSON."

This is simply a letter from two citizens, Yesler and Williamson, who are not shown to have the slightest interest in the estate or to be entitled to administration, addressed to the probate court and asking the appointment of Daniel Bagley, another total stranger as administrator of the estate of John Thompson. We need not compare this with the statute above cited, for the court can see at a glance that it does not state a single jurisdictional fact showing that the court had jurisdiction to administer the estate of Thompson.

The only order appointing Bagley administrator was as follows:

"Whereas, John Thompson, of the county aforesaid, on the —— day of March, 1865, died intestate, leaving at the time of his death property subject to administration,

Now, therefore, know all men by these presents, that I do therefore appoint Daniel Bagley administrator upon said estate, and authorize him to administer the same according to law.

Dated March 26, 1865. THOMAS MERCER,
Probate Judge."

This order does not show the necessary jurisdictional facts any more than does the petition upon which it is based; though even if it did, all proceedings would be void if the petition was defective. We shall not over-

whelm the court with citations, but refer to the cases in the notes to that portion of the text of Cyc. found in Vol. 18, p. 122, which is as follows:

"The usual and regular method of applying for administration is by a petition or bill asking the appointment of the petitioner, or in some cases of some other person; and it has been held that an administrator can be appointed only when a proper petition is filed for that purpose. Jurisdiction to appoint should appear affirmatively on the face of the petition and the necessary facts should be alleged, such as death, last residence of decedent, the existence and *situs* if need be of assets, intestacy, where this is relied on, the right of the person who seeks administration, as next of kin, creditor, or otherwise, to be appointed, and, it has been held, the fact that he is qualified for the office."

The probate proceedings shown in this record are absolutely void upon their face, because of the manner in which it was attempted to conduct them, irrespective of the question of whether the court had jurisdiction of the subject matter. The proposed administration was conducted contrary to law in its initial step, and so all subsequent proceedings are necessarily void, and the court never acquired any jurisdiction either over the *rem*, the estate of Thompson, nor constructively over his heirs.

F.

By the so-called decree of distribution entered by the territorial probate court, it was attempted to divest the heirs of John Thompson, alias Lars Torgerson, of the title of their ancestor to the land in question. We insist that this proceeding is not "due process of law"

as that phrase is understood in American Constitutional Law. The Fifth Amendment to the Constitution of the United States ratified December 15, 1791, *inter alia* provided "No person shall be" * * * "deprived of life, liberty or property without due process of law." This, of course, was an inhibition laid upon the national government which came into existence under that Constitution. Later in 1868, by the Fourteenth Amendment this inhibition was likewise laid upon the state governments. Of course it is the first inhibition that concerns us, since the probate proceedings in question took place during territorial days, though most of the decisions construing this phrase "due process of law" have been decided under the Fourteenth Amendment. There have been many definitions of this phrase enunciated by the courts of last resort, and we respectfully refer the court for them, to Vol. 8 of Cyc. p. 1080.

The essential elements which we, in this case, invoke, are, that there must be an opportunity to be heard, or to use the more common expression, the party must have his "day in court"; that some notice, actual or constructive, must be given to the party interested; and that the proceedings taken shall be instituted and conducted according to the prescribed forms and solemnities for determining the title of property which are in vogue within the territorial jurisdiction for which the court is acting.

In a few words, we now wish to call the Court's attention to the nature of this proceeding in the territorial probate court.

It began March 26, 1865, by the filing in court of a letter addressed to the court by two ordinary individuals in no manner shown to be connected with John Thompson, requesting the appointment of another uninterested party to be administrator of Thompson's estate. On the same day the court rendered an order appointing the person so requested, to be administrator. Neither of these documents had any of the legal elements of a petition for letters of administration, or of an order appointing an administrator, as we have above shown. The estate seems to have lain idle for about three years, and then the Commissioners of the territorial county of King began to interfere by coming into court and asking to have the affairs of the estate closed up, and the property turned over to the County as escheated property. Nothing however, was done by the Court until after the administrator on February 12, 1869, filed a petition in which he asked to have the estate closed, and his accounts approved, and the property turned over to the County. And now on March 29, 1869, the court for the first time acted. Up to this time the proceedings appear to have been a defective attempt to administer a decedent's estate in the course of which the County had come in and claimed the property of the estate as escheated, and the administrator, by the petition which he filed, seems to have admitted that fact. The proceeding to this date has not a single element or form of an escheat proceeding. Nothing done by the court or by any of the parties, had given the proceeding the slightest resemblance to an escheat proceeding. And now the

court, in pursuance of the administrator's petition, entered an order which was published once a week for four weeks in a newspaper. This order and its publication, was the only thing in the whole of the proceeding which in the slightest degree resembled process, and it was addressed to "all persons interested in the estate of the said John Thompson, deceased," and they were ordered to appear "to show cause why an order of distribution should not be made of the residue of said estate *among the heirs of the deceased according to law.*" Not one word that there was any intention on the part of the court to attempt to escheat the property. Upon the return day of this process, the matter was continued and when taken up at the end of the continuance, the estate was closed up and the land was declared escheated.

Looking at this final decree of distribution, we find that it recites, that the administrator appeared in person, but no one else; that the usual steps in the administration of an estate, such as the inventory, appraisement, notice to creditors and the like, had all been taken; it recites there was presented to the court the documentary evidence showing these facts, and that the administrator was examined under oath; there is no hearing of any kind as to the existence of heirs recited, but the court suddenly makes a finding that there are no heirs; then the court enters the usual orders approving what was done in the course of administration and discharging the administrator; then the court distributes the entire estate to the County of King in Washington territory; and then the court makes a statement as to

what composes the estate including the land in question in this case. Up until the entry of the final order, everything appears to have been an ordinary administration of an estate in the ordinary course of probate and the forms and procedure suited to such a proceeding were used, the notice which was published being published in pursuance of the terms of the statute requiring a notice to be published of the closing up of estates (Secs. 317-18-19, Sess. Laws 1863. p. 257.) It is true the county had filed some papers in court, saying it claimed the property was escheated and that the administrator in his final report also declared that to be his opinion, but the order which was published based upon such report, said nothing about escheat, and the court took no proceedings of any kind which showed that it was dealing with the matter of escheats until it suddenly entered this final decree of distribution, and then without anything on which to base such an act, it suddenly escheated the property. Thus it will be seen that the heirs of John Thompson never had their day in court in the matter of escheating the property of their ancestor. Without any pleadings or issues involving such a question being before the court; without evidence heard, the court unexpectedly and suddenly acts. This is not due process of law.

The second principle in reference to due process of law, is that there must be some kind of process, actual or substituted, served upon the party whose rights are to be affected or divested. The only proceeding in this estate which even bears a semblance to process is the

order of the final closing of the estate which was published once a week for four weeks, and this notice expressly ordered the parties to appear for the purpose of having the estate distributed among the heirs of Thompson. There was therefore no process of any kind on which this order of escheat was predicated, and so there was not due process of law.

At the time these probate proceedings were had, there was on the statute books of the territory of Washington, a statute providing a procedure for escheating property. We have cited it before in full, and it is found in Sec. 480, Chap. 52, Sess. Laws 1854, p. 218. It is thereby provided that any suit to escheat property shall be brought by the prosecuting attorney by information in the district court, and that "like proceedings and judgment shall be as in a civil action for the recovery of property." Turning to the Civil Practice Act of the territory in Sec. 22, Chap. 3, Sess. Laws 1859, p. 9, we find provision made as to how parties shall be brought before the court by constructive service by publication. Such portion of that section as applies to the case at bar is in the following language:

"In case personal service cannot be had, by reason of the absence of the defendant, and the defendant is a proper party to an action where actual personal notice is not required by law, or is a proper party to an action relating to real estate in the district, it shall be proper to publish the notice, with a brief statement of the object and prayer of the petition or complaint, in some weekly newspaper published in this territory, or in Portland, Oregon; which notice shall be published not less

than once a week for three months prior to the commencement of the term of the court when such cause shall be heard."

This statute not only applies to civil actions in general, and thus is included in the reference to civil procedure made in the other act, but by its own terms it particularly applies to any action which might be brought to divest parties of title to real estate, because it says, that this method of service shall be used whenever the defendant cannot be actually served, or whenever the defendant is a proper party to an action relating to real estate. It will thus be seen that there was in the laws of the territory, a complete method of procedure prescribed for bringing escheat proceedings, and incidentally thereto bringing parties interested before the court by constructive process. Had there been any attempt to conform to this method of procedure and the jurisdictional portions of the law complied with, the proceeding would have been due process of law. But when this probate court of limited jurisdiction assumed to confiscate the property of the decedent, and transfer it to some one besides his heirs, the proceedings were not instituted and conducted according to the prescribed forms and solemnities for determining the title of property which were in vogue within the territorial jurisdiction for which the court was acting, and therefore were not due process of law.

For the six reasons above given, we claim that the proceedings in the territorial probate court were in legal effect an absolute nullity, and constituted no judgment.

decree or adjudication upon which any rights could be based. It was simply a void judgment, and it is not out of place for us in this connection to cite to the court the language of Freeman in his work on Judgments (4th Ed., Section 117) where he says:

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void." * * * "If it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third person, no power residing in any legislature or other department of the government, can invest it with any of the elements of power or of vitality."

IV.

THE STATUTE OF LIMITATIONS DOES NOT APPLY BECAUSE THE POSSESSION OF THE DEFENDANT IS NOT ADVERSE.

The control and possession of the county over the land in question in this case as shown on this record began by the county's having had the property stricken from the treasurer's rolls for purposes of taxation after the order of the probate court giving the same to the county, was entered, which was in 1869. The county did not make any specific use of this property for 16 years, and then in 1885, it occupied a portion known as the King County Farm, and began letting the same out to tenants for the purpose of producing a monetary in-

come. In 1892, it platted a portion of the land under the name of "King County Addition to Seattle," and began selling off lots. In 1900, it began using a portion of the property for county hospital purposes. In 1903, it platted the remainder of the property, calling it "King County Second Addition to Seattle" and began selling off lots.

Under this state of facts we insist that the county *could not,* and *did not* have adverse possession as against the heirs of Lars Torgerson, alias John Thompson.

It *could not* have adverse possession against the heirs, because:

A. All possessory acts of the county infringed the constitutional inhibition against taking private property for public use without just compensation.

B. All possessory acts of the county were *ultra vires.*

It *did not* have adverse possession against the heirs because:

C. The possession taken by the county recognized the title of the heirs.

D. The possession of the county was not under claim of right nor color of title.

A.

We believe we have above shown conclusively that

the property in question never escheated to the territorial County of King, and also that the probate proceedings assuming to give the property to the county, were an absolute nullity. The demurrer admits that the county has absolutely no paper title unless it be the order of the probate court. So this leaves the county with no title except the one which it may derive from the mere fact of possesssion under the accompanying circumstances as they are shown in the complaint in this case.

Our first contention in this connection is that the county had no power to appropriate to itself the private property of individuals, unless it were either by purchase or condemnation, accompanied with a rendering to the person whose property is taken, a just compensation therefor. All functions of the county are governmental and are acts of the government performed through the county. The government to which the territorial county was subservient as the sovereign power was the United States, and all acts of the county were the acts of the United States. The Fifth Amendment to the United States Constitution contains this inhibition as to the taking of private property.

In support of our position that the acts of a *quasi*-municipality like the county, are those of the government, we refer the court to the language used in the case of *Madden vs. Lancaster County*, 65 Fed. 188-191 where it is said:

"Cities and municipal bodies, that voluntarily ac-

cept charters from the state to govern themselves, and to manage their own local affairs, are municipal corporations proper." * * * "Counties, townships, school districts, and road districts are not municipal corporations proper." * * * "The latter, even when invested with corporate capacity and the power of taxation, are but quasi corporations, with limited powers and liabilities. They exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state."

In support of our position that the appropriation of property to its own purposes by a county is a violation of the inhibition contained in the United States Constitution, we refer the court to the opinion of one of the greatest lawyers the United States has ever produced, the author of the Commentaries on American Law, and who held the positions consecutively of Chief Justice and Chancellor of New York State, James Kent.

In the case of *Jackson vs. Cory*, 8 Johns. 385-388, the facts were that in 1791, a certain tract of land was granted to "The People of Otsego County," and the next year, in 1792, the county promptly erected upon the land a court house and jail. They held possession of such property for 15 years, until 1806, when under an act of the New York legislature authorizing the county to sell the property, it was deeded to the defendant in the suit, and he held possession some four or five years before the action was brought. The plaintiff claimed under the original grantor to "The People

of Otsego County," and insisted that the deed to "The People of Otsego County" was void because the county could not take as grantee under such description. The court held this deed void upon its face. The defendant also claimed that he got a good title from the county, because the county in 1806, had been authorized to sell the land. In this connection Chief Justice Kent said:

"Nor can the Act of 1806, authorizing the supervisors to sell the premises, be construed to divest the lessors of the plaintiff of their right. It is not to be presumed that the legislature intended to authorize the supervisors to convey anything more than the right and title which they might have had in the lot. The act was, no doubt, passed under the impression that the supervisors had a legal conveyance for the premises; and from the principles contained in the case of *Jackson vs. Catlin* (2 Johns. Rep. 248), and which has since been affirmed in the court for the Correction of Errors, conveyances by statute are not to be construed to pass any other or different right than that which the party before possessed. To take away private property by public authority, even for public uses, without making a just compensation, is against the fundamental principles of free government; and this limitation of power is to be found, as an express provision, in the Constitution of the United States."

When the county took possession and control of this land under what we can admit was an honest but a mistaken impression that the land had escheated to it, that act and every act which has been done by it or its officers or agents ever since, in continuing that possession, has been in contravention to the inhibition contained in the United States Constitution against the tak-

ing of private property for public use without just compensation; and consequently every such act has been null, void and of no legal effect, and could have no legal vitality which would enable it to constitute the basis of a possessory title.

Such acts and all possession predicated thereon, could not be adverse to the Thompson heirs, because they were forbidden by law.

When possession or control of land is taken, the circumstances existing at that time give character to the possession and such possession does not change unless there is a complete disseisin of the premises, and the taking of a new possession separate and distinct from the original one. All acts done by the present defendant in continuing the possession which it received from the territorial county, are as much in contravention to the constitutional inhibition, as were the acts of its predecessor. Moreover, the defendant being a county of the state of Washington, its acts since the organization of the state have also been in direct contravention of a like inhibition contained in the state constitution.

B.

Upon the same principle which we have invoked in the application of the constitutional inhibition, claiming that the acts in contravention thereof are null and void, and therefore cannot be made the basis for property rights, we, likewise, invoke the doctrine of *ultra vires*.

The right to take possession of lands as did the county in the case at bar for the mere purpose of owning them, and having at the time no use for them for any county purpose, was wholly unauthorized by law and out of such possession no possessory title could arise, nor could such illegal and improper possession be held to be adverse to the real owner so as to enable the defendant illegally in possession of the property to set up such possession under the bar of the statute of limitations.

This position for which we contend is clearly laid down in the case of *Williams vs. Lash,* 8 Minn. 441-446, in the following language:

"A county is a body politic, having a corporate capacity only for particular, specified ends and purposes, and is termed by legal writers a quasi corporation, that is having corporate attributes sub modo. 2 Kent Com. 314. And the same author states, that the modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others. (2 Kent Com. 350.) This principle has been established and affirmed by numerous and uniform decisions in the United States and state courts, so that at this day it stands unquestioned, and the only difficulty that can arise with regard to it is to determine its applicability to the particular case in hand.

And, first, as to the powers of counties as expressly granted, defined and limited by statute at the time of the purchase of this real estate by the county of Ramsey, February 19, 1858. Sec. 251, Comp. Stat. 109, provides that 'each county shall continue to be a body politic and corporate for the following purposes, to-wit: To sue and be sued; to purchase and hold for the public use of the county lands lying within its own lim-

its, and any personal estate; to make all necessary contracts; and to do all other necessary acts in relation to the property and concerns of the county.' Some other provisions with regard to the power of county commissioners, having no bearing upon the question under discussion, need not here be cited.

It is to this enumeration of the powers of counties that we must look for the authority claimed by the county, or on its behalf, to purchase the lands in question. The second paragraph is the only one conferring express power upon the county to purchase and hold real estate. That limits the power of the county to the purchase of such lands only, as are for the public use of the county, and lying within its own limits. It will be observed by reference to the act of February 28, 1850 (Sess. Laws 1860, p. 131) that an additional grant of power was made, authorizing the county to purchase lands sold for taxes. The 'public use' by the county, mentioned in the statute, must mean that actual use, occupation and possession of real estate, rendered necessary for the proper discharge of the administrative or other functions of the county, through its appropriate officers."

The powers of the territorial county of King are almost identical with those in the case last cited. They are found in the Act in Relation to Counties, passed in 1854 (Sess. Laws 1854, p. 329) and are as follows:

Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That the several counties in this territory shall have capacity as bodies corporate, to sue and be sued in the manner prescribed by law; to purchase and hold lands within its own limits; to make such contracts and to purchase and hold such personal property as may be necessary to its corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county."

It was not within the power of the county in 1869 to take possession of this land, and having done so improperly and illegally, its act is null and void and of no legal effect, and no property rights can be predicated upon it.

C.

We have, as we believe, above demonstrated that the proceedings of the territorial probate court were a legal nullity, and upon them could be based no rights of any kind; but as written documents, they have an evidential value in so far as they show what was done. A plain and simple receipt for money creates no contractual obligation, but it is evidence of the highest character of the fact which it states, namely, that one person paid to another money. Had the county commissioners at the time the Thompson estate was closed in 1869 set up upon the county farm a monument on which was engraved the circumstances under which the county assumed to take possession of the land, and what its claims in that respect were, such monument with its inscriptions would be the very highest class of evidence to prove the facts which were stated. And thus, although no monument has been erected, the county commissioners of that day and their attorney went before the probate court of the territory and there did certain things and spread upon its records certain documents and papers and procured the probate judge to spread upon its records under the guise of orders and decrees, certain statements of facts which have thus been carefully preserved for

our use in the public archives, and although the things they did, and the things they said, and the things they procured the judge to say, had no vitality or force as judicial proceedings, still they are proper evidence of the highest type to prove what the county officials did, and what they said as evidencing the circumstances under which they took possession of the land in question, and thus give character to that possession.

Looking once more at the proceedings in the territorial probate court, we find that they were begun in March, 1865, immediately after Thompson's death. On May 26, 1868, a little more than three years later, the county commissioners of King county appear upon the scene with a sworn petition in which they state that they believe there is a large sum of money in the hands of the administrator, and no heirs have appeared to claim the same; that King county is entitled to the balance in the administrator's hands, and praying for an accounting and payment of the balance to the treasurer of King county. Here at the outset the county claims what is in the administrator's hands, because there are no heirs, thereby impliedly admitting that if there were heirs their title would be better than that of the county.

On the day last mentioned, the court issued a citation commanding the administrator to appear, in which citation it is recited that the county commissioners desired to have the residue of the estate paid over to the county.

On July 27, 1868, the administrator filed an an-

swer to said citation, and in it stated that a certain Mr. Wold, in behalf of the countrymen of John Thompson, had requested to have the matter held up to ascertain the whereabouts of the heirs of Thompson, as such countrymen of his were well assured that heirs were living in Sweden; and the administrator asked to have the matter go over until another term of court, and if no word was then had of the heirs he would turn over the property and effects to King County.

So that in response to the citation which they had procured, the county commissioners were informed that Thompson's countrymen thought they could find his heirs. This request was reasonable, as all parties knew that if they could be found the heirs had the better title, and so the matter went off until the fall of that year.

On October 29, 1868, John J. McGilvra filed an affidavit in the Court in which he stated he had been hired by the county commissioners to place the estate of John Thompson in such a position that the county, "to whom said estate by law escheats," may have the full benefit thereof. He then proceeds to make excuses for not having attended to the matter before, and asks for certain relief, referring to other matters. On February 10, 1869, the county filed its petition to have the administrator removed, giving seven different reasons therefor, four of which were in reference to his improper management of the real property of the decedent. Here the county once more shows that it is taking an active interest in this estate and is expecting to obtain the same in case no heirs are found.

On February 12, 1869, the administrator filed a petition to have the estate finally disposed of in the course of which he states "that no heirs at law of the said John Thompson have been found after diligent search and effort," and prays that he may be allowed to turn the residue of the estate over to King county. In pursuance of this petition, the court entered an order for all parties interested to show cause in connection with the settlement of the estate, and this order was published for four weeks in a newspaper. As we have before stated, this order said nothing about escheat, but said that the estate was "to be divided among the heirs of said deceased according to law."

On May 26, 1869, the final decree discharging the administrator and assuming to distribute the estate was entered. In this decree it is recited that Thompson died intestate, leaving no heirs surviving him, and also "there being no heirs of said decedent, that the entire estate escheat to the county of King in Washington territory." Such decree then proceeds to adjudicate that the whole estate of Thompson "be and the same is hereby distributed as follows, to-wit: The entire estate to the county of King in Washington territory." Then follows a portion of the decree approving the acts of the administrator and discharging him. Then follows a description of what composes the residue of the estate, which is referred to in the decree, and it mentions (1) certain cash, (2) the real estate in question in this case, and (3) a claim for rents reserved under a lease.

It will thus be seen that the county claimed this property because it believed that the same escheated, and that it was entitled to escheated property. This fact that such was its claim is shown clearly and explicitly in the documents which the county commissioners and also which their attorney have spread upon these court records, and it is also shown clearly in these orders and decrees which were spread upon these court records by the judge at the instigation of the county and its attorney. Promptly upon the entry of this supposed decree of escheat, the county exercised its control over this property by having the same marked as exempt from taxation upon the treasurer's rolls, and 16 years afterwards took actual physical possession of the property, and began letting it out to tenants for monetary profit. What uses may have been made of it since by the territorial county, or the defendant, which was its successor, cannot matter. The territorial county of King took possession of this property under circumstances where it admitted that the title of the heirs of John Thompson was better than its title, if there were such heirs, and the presumption of heirship never having been legally destroyed by proper escheat proceedings, the possession of the county has never become adverse. It plainly appears from these facts that the county never claimed any title or right of its own traceable from any source whatever save the right of the sovereign to take escheated property, a condition precedent to the existence of which right would be the nonexistence of heirs, and it goes without saying that until

the non-existence of heirs is legally established by formal escheat proceedings, no sovereign can take a title which would be adverse to such heirs. That a taking of possession of land under circumstances which recognized that there is a superior title, cannot be an entry upon which can be based adverse possession as against that superior title, is clearly held in *Port Townsend vs. Sears,* 34 Wash. 413, where the Court says:

"To constitute an adverse possession there must be not only an ouster of the real owner followed by an actual, notorious and continuous possession on the part of the claimant during the statutory period, but there must have existed an intention on his part for a like period to claim in hostility to the title of the real owner. *Blake v. Shriver,* 27 Wash. 597.) Possession is not adverse 'if it be held under or subservient to a higher title.'" (*Bellingham Bay Land Co. v. Dibble,* 4 Wash. 764.)

Again in *McNaught-Collins Imp. Co. vs. May,* 52 Wash. 635, the Court says:

"It must be continuous and exclusive, of course, and under color of title or claim of right, in good faith; otherwise the claimant would simply be a common trespasser. This disseisin must necessarily and logically constitute the commencement of a new title working a change in the ownership of the land; the initiation of a title which will ripen into ownership, if persisted in and not interfered with by the true owner. The possession must be an independent possession, and not subservient to a superior right or title. Then, if at some particular time there must be a disseisin which starts the new title in the claimant, when does that time arise under the theory announced in *Johnson vs. Connor?* When the claimant settles upon the land, believing it to be government land, his possession is subser-

vient to the government. It is true, by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make formal application for the land. But in no sense could he be said to be holding possession adverse to the true owner at that time."

We take the liberty of analyzing the language of this case and applying it to the case at bar: "The possession must be an independent possession and not subservient to a superior right or title." In the case at bar the county's possession was not an independent possession. On the contrary, it was absolutely dependent upon the non-existence of heirs, and if heirs did exist the county had no title whatever. "When the claimant settles upon the land believing it to be government land his possession is subservient to the government." When the county settled upon the land believing it to belong to the Thompson heirs, if there were any, its possession was subservient to the title of such heirs. "It is true, by observing the rules prescribed by the government, he may claim some rights under his possession when he comes to make formal application for the land." It is true, by observing the rules and laws prescribed by the territory, the county might have claimed some rights under its possession when it took formal escheat proceedings to terminate the presumption of heirship. "There is no hostile possession adverse to the true owner at that time." In the case at bar, at the time the county took possession, it was not hostile or adverse to the heirs, for the county well knew that their title was the better, and as it was chargeable with knowledge of the

law, it knew that the title of the heirs could not cease until escheat proceedings had been taken.

The following cases also sustain this proposition, and we do not believe there can be found any to contravene it:

"To show conclusively that adverseness is universally regarded as a question of law, and not of fact, the books proceed to discuss the circumstances under which possession would be held to be adverse or otherwise; as, for instance, it is held that possession will not be adverse if it be held under or subservient to a higher title."

Bellingham Bay Land Co. v. Dibble, 4 Wash. 764-7.

"A possession in order to be adverse must be accompanied with a claim of the entire title. If it appears that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse to that title."

Jackson v. Johnson, 5 Cow. 74-92.

"It is repugnant and absurd to lay a demise in the names of persons as heirs of the person last seized, when the action is brought upon the assumption that the land escheated for want of such heirs."

Catham v. State, 2 Head. (Tenn.) 553.

"Assuming the truth of all that the answer contains, and construing all that is there asserted most favorably for the defendant, it comes far short of establishing a possession adverse to the true owner. To constitute such a possession there must be a claim of title and the claim must be of the entire title. It must be such as necessarily to exclude the idea of title in any other person. 'When a plaintiff has shown title, and

the defendant relies on possession, the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests; and it must necessarily be exclusive of any other right. This doctrine has often been repeated. Let me ask what is meant by the *quo animo*. Is it an intent to take possession of another man's land, knowing it to be so, and make it his own by 20 years' possession? This will not be pretended. Such an entry would be a mere trespass, and the person so trespassing with no other pretense or color of title will always be a trespasser. The *animo*, then, or the intent with which the entry is made, must be bona fide an entry, believing, in good faith, that the land is his and he has the title.' (*Livingston v. The Peru Iron Co.*, 9 Wend. 511.) If it appears that the title claimed is subservient to, and admits the existence of, a higher title, the possession is not adverse. (*Smith v. Burtis*, 9 John. 180. See also *Jackson v. Johnson*, supra.)"

Howard v. Howard, 17 Barb. 663-667.

"To render possession adverse, so as to set the Statute of Limitations in motion, it must be accompanied with a claim of title; and this claim, when founded 'upon a written instrument as being a conveyance of the premises,' must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be 'exclusive of any other right'; and to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declarations or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession, under such circumstances, is not adverse."

McCracken v. City of San Francisco, 16 Cal. 591-637.

It seems to us that the fact that the county took possession of the land with full knowledge of the rights of the heirs and subject to those rights whatever they were, appears so clearly in this case that it is beyond dispute. That the possession so taken could not be adverse to the heirs seems also as a matter of law entirely beyond dispute.

D.

No possession is adverse in such a manner as to constitute a bar under the statute of limitations, unless the same is based either upon a claim of right or color of title, accompanied with an intention to oust or disseize the previous owner.

The county never had any intention to oust or disseize the heirs of John Thompson, because their taking possession was predicated upon the supposed fact that there were no such heirs. The county itself in the probate proceedings participated in declaring that there were no such persons, in fact based its claim upon their non-existence, and so could not as a physical possibility have intended to hold against them. There was certainly no intention to oust in this case.

The county did not have any claim of right to this property. It appears clearly and affirmatively just what was the claim of the county, and, such being the fact, no other basis of claim can be presumed or imagined. Its claim was that the title of John Thompson had ceased for lack of heirs, and that it being by law the

successor to the United States as sovereign in the matter of escheats, it took the title of the United States which accrued by reversion. If, then, as a matter of law, no reversion took place, and the title of John Thompson did not cease, then the county had no claim of right whatever. The county is a municipal corporation or artificial person and cannot actually think. Its thoughts are only such things as can be inferred from the acts of its officers and agents when they are given their proper legal effect under the law, and only such claims as it has, can it think it has.

One of the heirs of John Thompson, representing himself and the claims of the other heirs, is here demanding the property, and as the only right the county ever claimed was a right to the property if there were no such heirs, it cannot now assert against them some claim that it did not make at the time it took possession of the land.

The county has not got color of title. All documentary paper or record title of the county is negatived in this case unless the probate decree can be accounted as such. As we have above shown, for numerous reasons this probate decree is an absolute nullity for the purpose of creating legal rights or conveying any title to this land. But irrespective of how or why this decree may have been procured or come into existence, when we look at the document carefully it absolutely has none of the elements of color of title. It is not a conveyance. It does not purport to convey title; if so, whose title? Certainly not the title of the heirs

of John Thompson, for it says there are no such persons. Certainly not the title of John Thompson, because it distributes the property to the county upon the very ground that the title of John Thompson had ceased. It is not a decree of distribution, for such a decree could only give title to those claiming under the decedent. What is it, then? It is simply an awkward and illegal attempt of the probate court to convert the proceedings established by law for the distribution of an estate into an escheat proceeding. An escheat proceeding, if prosecuted to judgment, would not even then be color of title. The judgment of escheat would simply destroy the presumption of heirship, and the title would revert by operation of law, being founded upon the original title of the sovereign, and not upon any rights acquired under the escheat judgment. This improper attempt to escheat this property certainly cannot constitute color of title even if the court had not been without jurisdiction of the entire subject matter. Upon its face, this decree assuming to give this property to the county is a proceeding unknown to the law, and therefore cannot be color of title or constitute any other evidence of title.

In *Yesler Estate vs. Holmes,* 39 Wash. 34-36, the court says:

"On this subject the court, in substance, instructed the jury that, under our statute, the rightful owner of real property is seized of the same, whether he is in possession of it or not, and that disseizin can only occur where there is an adverse and hostile entry; that an entry to constitute an adverse or hostile entry must be

under a claim of right, made for the purpose of dispossessing the owner; and that an entry on the land of another, under a mistaken, though honest, belief that such lands are public lands and subject to entry, would not work a disseizin of the true owner." * * * "Under the rule of these cases, a mere naked possession is not sufficient to constitute adverse possession under the statute. Possession, to be adverse, must be actual, open, notorious, continuous, and under a claim of right or color of title."

In the above case the court says "That an entry on the lands of another under a mistaken, though honest, belief that such lands are public lands and subject to entry would not work a disseizin of the true owner." Escheated lands are public lands and they are subject to entry by the sovereign or its representative, though such entry cannot mature into a title until office found. So applying the language of this case to the case at bar, an entry upon the lands of the heirs under a mistaken though honest belief that such lands were escheated lands and subject to entry would not work a disseizin of the heirs.

As holding that the possession of land is not adverse unless there is an intention to oust the true owner, and a claim of right or color of title, we refer the court to the following cases:

"The uniform rule is that possession will not ripen into title unless such possession is exclusive, open, notorious, adverse, and under the above authorities, under a claim of right."

Wilcox v. Smith, 38 Wash. 585-590.

"Without especially reviewing all the cases cited by either the appellants or respondents, the overwhelming weight of authority seems to be that the basis of an adverse possession is a claim of title or right. An entry can only be made by the seizin of the claimant, or by an ouster of the owner of the freehold. There must be a disseizin before another can become legally possessed of the lands, and this, of course, can only be done by some act which works a disseizin of the original owner, for the seizin cannot abide in two claimants at the same time. And as the statute of limitations will not commence to run until this seizin, it becomes necessary to determine what acts will constitute a disseizin or dispossession of the original claimants. First, there must be an intention; that is, an entry for the purpose of dispossessing the owner. That intention, of course, must be determined by the acts of the usurper; and before the right of the owner could be extinguished, and his divestment established, and an investiture created for the usurper, there must, of necessity, be an adverse possession on the part of the new claimant. And while it is true that the statute provides that no action shall be maintained unless the plaintiff has been possessed within ten years, yet the question of whether or not the original owner is so disseized must of necessity, in a case like this, depend upon whether or not there has been an adverse possession of the defendants during the statutory period. For the disseizin can only occur where there is an adverse or hostile entry. This court has said in *Bellingham Bay Land Co. vs. Dibble,* 4 Wash. 764 (31 Pac. 30), that the entry must be under claim or color of title, or it would not ripen into title. And it was also said in *Balch vs. Smith,* 4 Wash. 497 (30 Pac. 648):

'In our opinion our statute of limitations is like that of most other states, one of adverse possession, and under it the rightful owner of real estate is seized of the same, whether or not he is in actual possession thereof, unless the same is in the actual adverse pos-

session of some other person. This being so, it follows that when ownership and seizin is once shown it will be presumed to have continued until such presumption is overcome by allegation and proof of adverse possession in someone else.' "

Blake v. Shriver, 27 Wash. 593-596.

"In this state possession of real property, to be adverse, must be actual, open, notorious, continuous, and under the claim of right, or color of title. Mere naked possession is not sufficient" * * *. This record does not disclose such a possession as the rule announced in these cases requires. While the possession shown has been sufficiently long, open, notorious, and continuous to ripen into title for at least a part of the land in dispute, it was not shown to have been either under a claim of right or color of title, and without one or the other of these essentials, possession, no matter how open and notorious, or how long continued, can never ripen into title.

Lohse vs. Burch, 42 Wash. 156-160-161.

For the foregoing four reasons, every one of which we believe to be well taken, we insist that the possession of the county was not adverse to the heirs of John Thompson, and therefore the protection of the statute of limitations cannot be invoked by the defendant.

V.

THE OPINION OF THE DISTRICT JUDGE.

We mean no disrespect in criticizing the opinion of the Judge who heard this case in the court below, but as that opinion appears in this record and is adverse to our client, our duty compels us so to do. Particularly is this the case because it passed upon several ques-

tions which arose in the court below, and which we feel certain will again be raised by counsel in this court, and so we might as well meet them now.

First: The District Judge held in this case that the county obtained a good title to the land in question under the proceedings of the territorial probate court, and therefore declared that it was unnecessary for him to pass upon the other questions involved. In order to reach the conclusion that he did, it was necessary for him to hold that escheated property would pass to the territory or its counties, and not to the United States. His reasoning is entirely based upon this principle, and if he is mistaken in this respect, the whole of his reasoning and logic fails. In fact this is a most important question in this case, because if this court finds that we are right in that escheated property passed to the United States in the territory of Washington, that one point is absolutely decisive of this case, without taking into consideration all the other good and valid reasons that we have given. This is so because if the county was not entitled to escheated property, all the court proceedings shown in this case are an absolute nullity, and also the county is without any claim of right or color of title on which to base an invocation of the statute of limitations. The importance of this question is our justification for the rather lengthy analysis of a certain case in which we are about to indulge. As above shown in our brief, the Supreme Court of the United States (*Church of Jesus Christ of Latter Day Saints vs. United States,* 136 U. S. 1), the Supreme Court

of Tennessee (*Williams vs. Wilson,* Martin & Yerger, 248), the Supreme Court of Alabama (*Etheridge vs. Doe,* 18 Ala. 565), the Supreme Court of Montana (*Territory vs. Lee,* 2 Mont. 124), and the Supreme Court of Iowa (*King vs. Ware,* 4 N. W. 858), have all clearly and specifically held that property which escheats in a territory of the United States, passes to the United States government. The trial judge seeks to cast reflections upon these cases by picking flaws in them, but that question we will take up later. He has selected the decision of the Supreme Court of Michigan in *Crane vs. Reeder,* 21 Mich. 24, on which to base his opinion, because in it are found sentences and remarks which would seem to militate against the position for which we contend, and also because the case finally holds that escheats which occurred in the territory composing the state of Michigan before that state existed became subsequently the property of the state. We mean no disrespect when we say that the trial judge did not read this case understandingly. What it decides is good law, but it has no more application to the law of the territory of Washington than it has to the law of our Philippine Island possessions. In treating of the subject of escheat there arises the question of sovereignty. Under our system of government there is in reality no sovereign (*Chisholm vs. Georgia,* 2 Dallas, 419), but this system which we have inherited from our ancestors is of such a nature that certain functions of government which were formerly exercised by the sovereign and certain property rights which formerly belonged to the sovereign must

be vested in some public authority. So the courts have by construction devolved such duties and rights upon that officer or branch of the government whose functions most nearly, under our system, resembled those of the British sovereign under the common law. The principles of international law in respect to sovereignty also frequently are involved in the case. As the different territories of the United States have been acquired in different manners, the method of their acquirement cuts a very important figure, and no one can judge of what is the proper construction to be put upon the law unless familiar with the history of the acquirement of such territory. There is no branch of the law in which the knowledge of the history of the subject matter under discussion is more essential than in the one we are now considering. In their opinions upon these questions the judges (they and counsel both being thoroughly posted) assume that those they are addressing have the historical knowledge referring to the subject matter, and so their opinions cannot be understood by one reading them unless he has that knowledge. It would not be expected that a judge in Georgia would have the historical knowledge in reference to the Lewis and Clarke Exploration and the achievements of Marcus Whitman, which a judge in Oregon or Washington would take judicial notice of. Nor would it be expected that a judge in Massachusetts would be familiar with the history of the conquest of California and so much of the Mexican law and the peace treaties as would affect titles in that state and be taken judicial notice of

by the courts. It therefore shows no disrespect on our part when we say that the trial judge did not understandingly read a decision referring to the territory of Virginia northwest of the Ohio river. We do not know where the judge studied law, but feel positive that it could not have been either in Ohio, Indiana, Illinois, Michigan or Wisconsin.

We will now state as succinctly as we can the history of the "Old Northwest Territory," and then when this Michigan case is read in the light of that history it will have an entirely different aspect than it would appear to have from disjointed extracts from the opinion. It will transpire that it not only is not inconsistent with our contention, but in principle, exactly coincides therewith.

The Colony of Virginia comprised that territory which is now the states of Virginia and West Virginia, and under its crown grants it claimed to be the owner of the territory northwest of the Ohio river extending to the Great Lakes and the Mississippi river. At the end of the Revolutionary War there was a dispute as to whether the United States or Great Britain was entitled to this region, both claiming it. During the first negotiations for peace nothing had been mentioned in reference to this subject, and so in the final settlement it was necessary to appeal to international law. It is a principle of international law that when a peace is concluded all debatable territory which has not been made the subject matter of express agreement belongs to that one of the belligerents who is in military possession

thereof at the time hostilities ceased. Not long before the close of the Revolutionary War, Gen. George Rogers Clarke, leading a body of American frontiersmen backed by Indian allies, had captured the military post at Kaskaskia (afterwards the capital of Illinois), on the Mississippi river, and then during the winter made a forced march across what is now the state of Illinois, and captured Fort St. Vincents (now Vincennes, Ind.), on the Wabash river. He was acting in the name of the State of Virginia. Fort St. Vincents was the leading military post in the Northwest Territory, and so at the conclusion of the Revolutionary War the flag of the State of Virginia was flying over that fort, and Great Britain was compelled to acknowledge that such territory was in the military possession of the United States. This incident is referred to in the Act of Cession of Virginia, when it provided "that a quantity not exceeding 150,000 acres of land, promised by this State, shall be allowed and granted to the then Colonel, now General George Rogers Clarke, and to the officers and soldiers of his regiment, who marched with him when the posts of Kaskaskies and St. Vincents were reduced." Of course under these circumstances the title of the state of Virginia to said Northwest Territory was beyond dispute as far as the other states of the then confederation were concerned. However, the state of Virginia magnanimously made a present of this territory to the Confederation by an act passed December 20, 1783, directing its delegates in Congress to deed the same to the United States. In pursuance of such directions, on March 1,

1784, Thomas Jefferson, James Monroe, S. Hardy and Arthur Lee, the Virginia delegates in the Continental Congress, made a deed of such territory to the Confederation. On July 13, 1787, one month before the United States Constitutional Convention met, and almost two years before the constitution went into effect, the Continental Congress enacted "An Ordinance for the government of the territory of the United States Northwest of the river Ohio."

(This Deed of Cession and Ordinance and all acts of Congress and of the State of Virginia in reference to this subject matter will be found in the beginning of either Hurd's Rev. Stat. of Ill. or Starr & Curtiss Ann. Stat. of Ill. following the Constitution of the U. S. and preceding the State Constitutions.)

From this Northwest Territory have been created the present states of Ohio (except a small portion of the northeast corner thereof, known as the Western Reserve of Connecticut), Indiana, Illinois, Michigan and Wisconsin.

In the case of *Crane vs. Reeder* which we are discussing, the Supreme Court of Michigan had before it the problem of ascertaining upon whom devolved the right of sovereignty in the Northwest Territory to such an extent and in such a manner that such person or government would take escheated property. The state of Virginia had completely parted with its title and control of the land to the Confederation composed of the states which were originally the 13 Colonies. This Con-

federation was not a sovereign power. In the articles creating it, it is styled a "Confederacy," and it is stated that "the said states hereby severally enter into a formal league of friendship with each other for their common defense," etc., and it was declared that "each state retains its sovereignty, freedom and independence." The relation existing between these states was simply an offensive and defensive alliance, by treaty between sovereign powers. Where, then, did the sovereign power lie? The Supreme Court of Michigan in the case under discussion correctly reasons this proposition out as follows:

"The articles of confederation made no provision for the direct legislation of Congress over the local affairs of any part of the country, and such direct government, while possibly it might have been lawful, would have been at variance with the whole theory of local government, which had been acted upon both by states and colonies. The delegation of legislative powers to the territories was practically a necessity, and the ordinance of 1787, while retaining a right of veto or disapproval of the acts of the governor and judges, provides expressly that such laws as are not disapproved shall only be repealed by the local authority. No one can read the ordinance without perceiving that it was intended to throw the whole regulation of local affairs upon the local government." "Immediately after the government of the United States was organized under the constitution, a brief statute was passed to adapt the ordinance to the constitution—not to change its nature—but, as stated in the preamble, in order that it *'may continue to have full effect.'* And so long as the system should continue, the whole local regulation was clearly delegated to the territory, as it was afterwards to Michigan when separately organized." "The creation of such a govern-

ment would be at least an equivalent to the erection of a county palatine, and would transfer all necessary sovereign prerogatives. But under this ordinance the territory only differed from a state in holding derivative instead of independent functions, and in being subject to such changes as congress might adopt."

The court then proceeded to analyze the ordinance of 1787, and point out that the law of descents therein provided varied from the common law and was in a number of respects defective; that the ordinance was silent on the question of escheats, and that the governor and judges who were the legislature of the district under the ordinance, would have full power to legislate upon this subject. They did legislate upon this subject in 1818, and again in 1827, giving the escheats to the territory. Then in 1836, congress ratified the constitution of the state of Michigan which provided that the state should succeed to the rights of the territory of Michigan in this respect. The exact language of the court in this regard is as follows:

"But in regard to escheats the ordinance was entirely silent, and the act passed October 1st, 1818, declaring that they should '*accrue to the territory,*' was not in conflict with the ordinance. The succession act April 12th, 1827, was in this respect identical. The act of congress of June 15, 1836, preliminary to the admission of the state into the Union, accepts, ratifies and confirms the constitution, and the constitution (schedule, section 3) provides that 'all fines, penalties, forfeitures and *escheats* accruing to the territory of Michigan, shall accrue to the use of the state.' We think the state of Michigan became thereby entitled to the premises in controversy."

It will thus be seen that this case of *Crane vs. Reeder* can be correctly summed up to hold that at the time of the organization of the Northwest Territory, the United States was not a sovereign government; that the territorial government created by the ordinance of 1787, was endowed with all the sovereign powers that existed, including the right to escheat property; that such territorial government legislated upon such rights; that when the state of Michigan was admitted into the Union, its constitution expressly provided that the state should succeed to all the rights of the territory of Michigan in reference to escheats; and that the congress of the United States approved and confirmed this state constitution. There is absolutely not the slightest resemblance between the Northwest Territory and the Territory of Washington. The Northwest Territory was a sovereign power before the United States was, and the Washington Territory was a mere municipality created by the United States.

The Supreme Court of the United States in *the Church of Jesus Christ of Latter Day Saints vs. United States,* 136 U. S. 1, clearly and unequivocally decides that all escheats in a territory revert to the United States. Among the Justices of that court at the time the last mentioned decision was rendered, were Chief Justice Fuller, of Illinois, and Associate Justice Brown, of this very state of Michigan, both of whom came from portions of this Northwest Territory, and were perfectly familiar with the history of its organization, and well knew what the courts had said in regard to the

same. In the opinion in that case, special attention is called to the fact that the Northwest territory differed from all the other territories of the United States as is evidenced by the following language:

"It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, *other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution)* is derived from the treaty-making power and the power to declare and carry on war."

In this connection the judge criticises the case of *Williams vs. Wilson,* 1 Tenn. p. 247, by stating that it does not appear from the case that there was any territorial government to which the property could escheat. This is a captious criticism. We will ask the court to take judicial notice that there was a territory of Tennessee. That was what the Tennessee court did, and did not suppose in its opinion it was necessary so to state. It does appear that North Carolina ceded the territory in question to the United States government after that sovereign power had come into existence and that the escheat occurred before the state of Tennessee came into existence. Whatever may have been the machinery by which the United States operated its government in that locality, the fact still remains that this case adjudicates that the United States government is a sovereign and that there is no other sovereign until a state government is formed.

Also the Court criticises the Mormon Church case (136 U. S. 1), by explaining that in that case an act

of congress explicitly declared that the property should be forfeited to the United States. There was such an act of congress and of course the Court gave it weight and followed its directions, but the power to forfeit the property was not derived from the statute. It could not have been. Such a statute if based upon no pre-existing authority, would be simply confiscation. The power of congress to pass the act was dependent upon its inherent right as sovereign to control escheated property, and say what should be done with the same. And that is just what the Supreme Court of the United States in that case holds, when (differing with the learned judge in the court below) it says: "It was not necessary to resort to the condition imposed by the Act of 1862" * * * "Congress, for good and sufficient reasons of its own, independent of that limitation, or of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence." The Supreme Court thus specifically declares that the right of the government to abolish the church corporation and escheat its property, is not based upon the act of congress which is referred to by the judge in his opinion in this case.

The criticism of the judge upon *Territory vs. Lee*, 2 Mont. 124, is to call attention to the fact that the property sought to be escheated was in the nature of easements. This again is a captious criticism, because it makes no difference whether the property forfeited is personal or real, and if real, it makes no difference what is the estate which is held in the realty. All are proper-

ty, and the law of escheat applies equally to all when the title of the owner thereof fails, and there is nobody who can take in succession to him.

Second: We have raised the question that the law of the territory in regard to the descent of realty was invalid, because the title of the Probate Practice Act was not broad enough to include this subject matter, there being in the Organic Law a provision that every law shall embrace but one object, and that shall be expressed in the title. To this contention of ours, there has not been and cannot be made any answer. The point is well taken, and the law of the subject is clear. The only defense made to this position by opposing counsel was to hold up *in terrorem* a wholesale destruction of titles to realty if the territorial law of descents was held invalid. The trial judge in his opinion takes this view. This kind of an argument *ab inexpedienti* is only to be resorted to in desperate cases. It impliedly acknowledges that what the man who uses it is contending for, is not the law, but that it should be held because it is the best thing for the general good. In other words, it is a direct request to a judicial officer to legislate. It is the growing use of this species of argument by the judiciary that has brought about the present agitation in reference to the recall of the judges. The people are reaching the conclusion that if the courts are not going to decide what the law is, but what it ought to be, then they can do that work themselves, if not better, at least more satisfactorily.

But let us see how extensive this threatened danger really is. This law of descent will be found in Chapter 14 of the Probate Practice Act of the Territory, Wash. Sess. Laws 1859-60. If it is held invalid, the common law will take its place. The only differences between this provision and the common law are, that if a person dies without issue, the father will inherit, if he survive, instead of the brothers and sisters. If there are no issue and no father, but one or more brothers or sisters living, and a mother, then the mother will take an equal share with the brothers and sisters. If there are no issue, and no father and no brother or sister living, the mother will take to the exclusion of any issue of deceased brothers or sisters. With these exceptions of the rights of the father and mother, the law is identical with the common law. Of course in the great majority of cases, an adult owning property will have issue and so it is only in the rare cases where a father or mother inherit, that any title would be affected by holding this law invalid. But even these cases are much lessened by the fact that if the father or mother died without having disposed of their interests, the descent would be cast in the same place that the common law would have cast it. So that the cases affected are now reduced to cases where the father or mother take the estate and then convey it away to strangers. This leaves but few titles where the question could be raised at all. But only ancient titles could be affected. In 1881, the laws of the territory were codified and reenacted as a whole, including this law of descents. (See

Code 1881, Chap. CCLV). To this codification the point we make cannot apply, and that law was valid in the territory since that time. Cases which come within the old statute prior to 1881 would all now be cured by the statute of limitations. The ten years statute of limitations creating a title by possession, has had an opportunity to run more than three times over. The seven years statute of limitations adopted in 1893, has had an opportunity to run for 19 years. Wherever the title had a chance to pass through judicial proceedings, so that the title was traced through a judicial deed, all right to attack the same expired one year after the so-called three years' statute of limitations was enacted in 1907. At a glance the court can see that instead of, as the trial judge says, one-half of the titles in the state being unsettled, there could not possibly be one title out of a hundred where the question could be raised, and not one out of a hundred of those in which it would not be cured by the statute of limitations, and that is not allowing for the practical protection to be derived from the fact that no person whose rights, if they had any, arose more than 31 years ago, would ever be likely to find out that they had any such rights. In a word, it could only apply to some phenomenal case like that at bar where the property had remained continuously in the same person's hands, and under such circumstances that that person did not hold adversely. It is well nigh impossible that any other case like this will ever arise in this state. Not one title in ten thousand could be affected, and it is not likely that any such ever

would be. Is this bogey so terrifying that, like frightened children, we should run and hide for protection behind the skirts of expediency?

Third: Counsel argued to the court below that because the probate court had power successively to pass upon the existence or non-existence of certain persons who would take under the decedent, it had a right to decide there was no one who could take under the decedent, and such decision would be binding on everybody. The trial judge took some stock in this argument, and in his opinion asks: "Why was it not equally competent for the probate court to determine there were no kindred and to escheat the property to the county?" This is a double question.

We will answer the first half by saying that the probate court had such power and could determine there were no kindred for the purpose of deciding that its jurisdiction had ceased, and there was nothing further for it to exercise its probate functions on, as it could not exercise the final act of administration by distributing the estate when there was no one to distribute it to.

The second half of the question we will answer by saying that the probate court could not act, because jurisdiction had ceased, and it could go no further, and the next step of escheating the property was entirely within the province of another court acting under a different method of procedure. Court and counsel both erroneously assume that the distributing of an estate

of a decedent, and the act of declaring an escheat, are one and the same thing. They certainly are not. The distribution of an estate is the act of setting off their respective shares of the estate to those who claim under the decedent. The declaration of an escheat is a decision that the title of the decedent has terminated, and that an outside party not claiming under the decedent is entitled to the possession of the property by reason of a reversion upon failure of an intermediate estate. The declaration of an escheat is not the exercise of the probate function. In this connection we call the court's attention to the fact that the principal powers of judicial officers under the Anglo-Saxon jurisprudence which we have inherited are of four kinds (although there are other lesser ones): Legal, Equitable, Criminal and Ecclesiastical. Although the modern tendency, under Codes, has been to abolish differences in procedure as much as the nature of the subject matter will allow, still these different judicial functions are entirely separate and distinct. They acquire jurisdiction by different kinds of *mesne* process. Their issues are made by different kinds of pleadings. They hear different kinds of evidence and require different degrees of proof. They enter different kinds of judgments, giving totally distinct kinds of relief or imposing distinctly different penalties. They issue entirely distinct and separate kinds of judicial process. There is no such thing as intermingling these different functions except in cases where the legislature by express enactment has seen fit to so authorize. With

these premises, we answer the judge's question emphatically "No," for three reasons: 1st, Because when the judge has by a process of elimination reached the conclusion that there is no one claiming under the decedent to whom to distribute the estate, he has at the same time reached the conclusion that his probate jurisdiction has ceased. 2d, The probate proceedings culminating in a distribution are based upon certain *mesne* process, in this case a four weeks' publication. The process which would be necessary to sustain the jurisdiction of the court for escheating purposes would be a twelve weeks' publication. Therefore the court no longer has jurisdiction of the subject matter, for lack of process on which to base his further acts. 3d, To allow a person hitherto an entire stranger to the proceedings to suddenly come into the same and undertake to assert a legal right to divest others of the title to property, would be to suddenly transfer the cause from the ecclesiastical court to the court of common law. Let us look at some of the things which could be done if what is here sought to be done, were allowed.

A man is indicted for obtaining money under false pretenses. It transpires it was an honest loan. The parties are all before the court. Why not render a monetary judgment in favor of the prosecuting witness and against the criminal? Or invert the case.

One man sues another for a sum of money which he gave him. It transpires that the money has been repaid, but was originally obtained by false pretenses. Why not sentence him to the penitentiary?

The administration of an estate is begun in the probate court, the decedent having left real property. It transpires that upon this property there is a mortgage and also a mechanic's lien. Why not allow both the mortgagee and the lien claimant to come into the probate court and enforce their encumbrances? The land is before the court, the persons claiming under the decedent are before the court. What harm is done by letting in a couple of strangers and letting the probate court try its hand at exercising equitable functions?

These illustrations we admit are silly and ridiculous, but they are exactly analogous in principle to what was done by the territorial probate court in the case at bar. To our way of thinking it borders on the humorous to suggest that a court by finding a successive series of facts, can by a process of elimination, destroy its own jurisdiction over the subject matter, and *co instanti* that it disappears, acquire a new jurisdiction for a different purpose.

CONCLUSION.

We believe that we have shown many good reasons which conclusively establish the four propositions for which we have contended, namely:

I. No facts on which to base laches and estoppel are shown in the complaint, nor could they be set up as defenses to this action.

II. The territorial County of King, to whose title, if any, the defendant succeeds, never acquired any title to the land in question by escheat.

III. The proceedings in the territorial probate court were in legal effect an absolute nullity.

IV. The statute of limitations does not apply because the possession of the defendant is not adverse.

Such being the case, this cause should be reversed and remanded to the district court with instructions to overrule the demurrer to the amended complaint, and proceed with the action according to due course of law.

We are fully aware that we have got a case which at first glance provokes antagonism of those to whom it is submitted, for two reasons: 1st, because more than forty years have elapsed since the county took possession of this land, and, 2d, because it is an attempt to take very valuable property from a county, which is the representative of the people.

Our client's cause is righteous. Our client is claiming for himself and his co-heirs, the property which rightfully belonged to their ancestor, Lars Torgerson. If it has become immensely valuable, both legally and morally they are entitled to the unearned increment produced by the growth of the city of Seattle and the State of Washington. The county never paid a dollar for the land, and has no legal or moral claim to it. It simply found it vacant and attempted to appropriate it. What improvements it has placed upon

the same, we are not seeking to take from it, for though a portion of them would be legally ours, none of them would be morally. We expect that counsel will repeat the argument which they made in the court below that public policy forbids depriving a municipality of such valuable property, and that the trial judge should sustain the demurrer because it would cost the county so much to defend the suit upon the merits. The only comment that we will make upon this style of argument is to quote to this court the language of Stephen J. Field, then Chief Justice of California, in *McCracken vs. City of San Francisco,* 16 Cal. 633, in a case involving approximately a half million dollars, as does the one at bar, where he said: "Be this, however, as it may, it can have no weight in the determination of the case. It is our duty to pronounce the law, and with the consequences which follow we have nothing to do—whether they be to cast upon the city a liability of one dollar or of a million." And in this connection it would not be inappropriate to remind the court of the famous saying of Chief Justice Sharswood of Pennsylvania that: "It is the duty of a judge to hew to the line, let the chips fall where they may."

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CHRISTIANSON,
Plaintiff in Error,

vs.

THE COUNTY OF KING,
Defendant in Error.

No. 2163

Error to District Court of Western District of Washington, Northern Division

HON. FRANK H. RUDKIN, *Judge*.

Brief for Defendant in Error

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STATEMENT OF DEFENDANT IN ERROR

This is a statutory action brought by plaintiff in error against the County of King to recover the

possession of the property described in the complaint, and to quiet title of plaintiff in error thereto. With a view to having certain questions of law settled, plaintiff in error has plead some of the records of the territorial probate court of King County made in probate of the estate of John Thompson, deceased. The amended complaint differs from the original in that it sets up, in *haec verba,* the records that were plead originally, by reference, with allegations and admissions as to their legal effect. Later on we wish to direct attention to the original complaint and to admissions made therein.

The learned trial court wrote an exhaustive opinion upon sustaining the demurrer of defendant in error interposed to the original complaint. Subsequently the amended complaint was filed and the demurrer again sustained, the court being of the opinion that the amended complaint in no way modified the original. The action was then dismissed. The opinion of Judge Rudkin clearly states the view of defendant in error as to the merits of the suit. Coming, as it does, from a court long familiar with the statutes of the territory, and State of Washington, and the practice thereunder, it is entitled to the highest consideration by this court, and we ask its careful examination.

The property involved in this litigation, at the time of the death of John Thompson, wos located in what was then a wilderness of woods and undeveloped country. The probate records in his estate shows that it was appraised at $2,500. The long lapse of time and the development of the city has increased the value until now the property in

suit could be sold for at least $500,000. The City of Seattle has grown up around it; it is close to the railroad yards and outlying business properties. Its great value is to be attributed to this development, and to the expensive buildings and other improvements, which the county has erected upon it. It is needless to say that this litigation is of the utmost importance to all the parties concerned, and especially to the defendant in error, who has, as the record shows, been in possession of this property since the 26th day of May, 1869. We therefore feel that the title, after all these years, considering that the property has been exempt from taxation, that large sums of public money have been spent in its development, should not be overthrown for light and technical reasons; that, on tho ether hand, the court should follow the sound policy so often stated in the decisions of protecting this title against the stale and ancient claim now preferred by plaintiff in error.

We shall refer to the several contentions of plaintiff in error as they arise under our own analysis of the case. We wish to say now, however, that plaintiff in error has cited and relies, upon statutes which were repealed before the death of John Thompson; and that the Court is referred to decisions which have absolutely no bearing upon the issues. There is a great wealth of law to be presented, which sustains the contentions of defendant in error. The members of this Court, coming from other jurisdictions, may not be familiar with the many statutes of the territory and State of Washington, which control; we will therefore present our views of this controversy at length. From the re-

mote, speculative and illusory contentions of plaintiff in error, we will direct the Court's attention to concrete statutes and decisions germane to the case.

ARGUMENT OF DEFENDANT IN ERROR.

The amended demurrer of defendant in error presented three main propositions, all of which were argued and considered by the trial court:

(A) The decree of the probate court escheating the property to the County of King is a valid decree and was within the jurisdiction of the territorial probate court.

(B) The statutes of limitation have run against the rights of plaintiff in error.

(C) Plaintiff in error is now estopped by his laches and procrastination from maintaining this action.

PROPOSITION A.

The second ground of the demurrer, as stated, is, "that the said complaint does not state facts sufficient to constitute a cause of action against the defendant." Plaintiff in error has plead many of the records of the probate proceedings of John Thompson, deceased. These records are therefore a part of the cause of action which he presents; hence this second ground of the demurrer raises the proposition that: "The decree of the probate court escheating the property to the County is a valid decree and was within the jurisdiction of the territorial probate court."

Before discussing the many territorial statutes and decisions touching this question, we wish to eliminate certain features over which there can be no controversy.

First. It appears from the allegations of the complaint that Lars Torgerson Grotnes left his home in Porsgrund, Norway, in 1829, and came to America as a sailor. In 1856 he deserted his vessel in the City of San Francisco, and came to Puget Sound. It is said that in order to prevent his detection and punishment, for deserting the vessel, he changed his name to John Thompson. This change in name was made at the time he came to Puget Sound and before he acquired the property in dispute. He continued the use of this adopted name during his residence and until his death in 1865. No allegation is made that he was ever known in this community by the other named, or that he ever used it after his arrival. It is clear in law that he had a right to change his name by voluntary act, and

that his adopted name became his true, legal and only name.

29 *Cyc.* 271.
Smith v. U. S. Casualty Co., 26 L. R. A. (New Series) 1170.
Linton v. First National Bank, etc., 10 Fed. 896.

No charge is made that King County, through any of its officers or agents, or the probate court, or the administrator of his estate, or in fact any person involved, knew that he at one time had another name, and had changed it to John Thompson. If the probate court acquired jurisdiction over the estate of John Thompson, deceased, and had authority to enter the decree of escheat, such jurisdiction, and the decree founded thereon, becomes as effective and binding upon his heirs as if his estate had been probated under the name given him by his parents. In fact, his estate could only have been legally probated under the name of John Thompson. The change in name, therefore, has nothing whatever to do with the merits or the claim advanced by plaintiff in error.

Second. The territorial probate court acquired jurisdiction over the estate of John Thompson, deceased, and such jurisdiction continued until it was exhausted by the entry of a final decree forever disposing of said estate. Plaintiff in error for the first time now asserts that the probate court never acquired jurisdiction over said estate for any purpose whatsoever, and that the entire probate record is therefore a nullity. This claim was not made in the court below. But in any event, under the statutes

of the territory and decisions it is untenable. The probate record plead show that shortly after the death of John Thompson, a petition was filed with said court asking for the appointment of an administrator of said estate. This petition was acted upon by the probate court and Daniel Bagley was duly appointed administrator. The petition was regularly filed March 11, 1865, and granted March 26th of the same year. It is clearly sufficient to confer jurisdiction.

The seventh provision of Section 89 of the Probate Practice Act (quoted on page 43 of the brief of plaintiff in error) confers full authority upon that court to appoint any disinterested and competent person, or persons, to administer an estate when requested so to do by petition of any person, or persons, interested in a just administration thereof.

Plaintiff in error does not plead all of the records of the probate court. These records show that subsequent to the appointment of the administrator, he assumed charge and control over the property, filed proper inventory, and proceeded under the direction of the probate court to receive and allow numerous claims, which were thereafterwards paid. Such facts can, and must be inferred from recitals in the decree of the probate court. Notice to creditors was published and everything done that is usually done in the probate of an estate. If no petition appeared in the records, however, the recitals in the numerous findings made by the probate court would be sufficient to sustain the action of that court in proceeding to appoint an administrator, as is clearly

established in the case of *McGee vs. Big Bend Land Co.*, 51 Wash. 406, wherein the Supreme Court of the State of Washington was considering the nature and jurisdiction of the territorial probate court.

The court holds that said court was of

"exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments, the granting of letters testamentary and of administration, and revoking the same. * * * Said court shall provide and keep a suitable seal and that the court established by this act shall be a court of record, and shall keep just and faithful records of its proceedings, and shall have the power to issue any and all writs which may be necessary to the exercise of its jurisdiction. * * * While in a sense general jurisdiction was not given to this court, exclusive original jurisdiction was given to it over the subject mentioned, viz., probate proceedings, and it is well established that such jurisdiction as this carries with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction."

In that case the court had under consideration the validity of an order of sale of property entered by the territorial probate court.

"It is, however, contended that the court acted without jurisdiction in this case, for the reason that the petition for the sale of the real estate did not conform to the requirements of the statute, and that the record does not show that Archie D. Melder, a minor, was ever served with notice of the probate proceedings, and especially of the sale of said land. It must be conceded that this is a collateral attack (Van Fleet on Collateral Attack, Sec. 3), and that in such cases the action of the court can be attacked only on questions of jurisdiction. As to the courts

of general jurisdiction, the great weight of authority is to the effect that jurisdiction will be presumed unless the contrary appears of record. If that rule is applicable to the old probate territorial courts, then the appellants have no standing, for it does not affirmatively appear by the record in any way that the minor heir was not notified of all the essential actions of the court. On this subject the record is silent, but the judgment is to the effect that all jurisdictional requirements have been met. * * * It therefore must follow that unless it effectively appears that the court acted without jurisdiction in some matters subsequent to the inauguration of the probate proceedings, the judgment of the probate court in selling and confirming the sale of the land must bepresumed to have been based on jurisdiction conferred."

The case arose under the probate laws of 1881, but they were identical with the laws of 1862 now under consideration. The authority and character of the two courts was precisely the same. The recitals in the orders and final decree of the probate court plead herein show that said court assumed jurisdiction over, and acted in the probation of the estate of John Thompson. And it is a waste of time, in the light of the decision above quoted and the common principles of law applicable, to now claim that said court never acquired jurisdiction to so do. That court knew, and was the exclusive judge, of when its jurisdiction attached.

In any event, however, the contention cannot be urged by plaintiff in error, for in paragraph IX of the original complaint it is alleged, and therefore admitted, "that on the 26th day of March, 1865, one Daniel Bagley was duly appointed administrator of the estate of John Thompson, deceased, by the pro-

bate court of King County in the territory of Washington; that such proceedings were had in said estate in said probate court; that on the 26th day of May, 1869, a final decree of distribution was entered in said estate, in which it was recited that the administrator had on February 12, 1869, obtained an order of court settling and allowing his final account, and recited that a time had been properly set for a hearing upon the entering of a decree of distribution in said estate and due and proper notice of such hearing had been given," etc.

This feature of the jurisdiction of the probate court cannot be attacked here.

The elimination of the foregoing leaves for consideration the real issues presented by proposition "A" above stated.

Was it within the authority of the probate court in the exercise of its jurisdiction on the facts before it, to declare an escheat of the Thompson estate to King County? We will answer in the affirmative under two headings. First, dealing with the Constitution of the United States and the Organic Act passed by congress March 2, 1853, organizing and creating the territory of Washington; and, second, the several sections of the probate law defining the authority of the probate court.

As to the first, plaintiff in error cites the court to several sections of the Organic Act (Secs. 1851, 1907 and 1924 Revised Statutes) which it is claimed restricted the authority of the territorial government to legislate upon the subject of escheats, and to grant to the probate court jurisdiction over the

same. Section 6 of said act (Secs. 1851 and 1924 R. S.), or so much thereof as is here involved, reads as follows:

"And be it further enacted, That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect. * * * To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

Section 9 of said act (Section 1907 Rev. Stat.) is as follows:

"And be it further enacted, That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years, and until their successors shall be appointed and qualified. The said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts, by one of the justices of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointments, respec-

tively reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law: Provided, That justices of the peace shall not have jurisdiction of any case in which the title to land shall in anywise come in question, or where the debt or damages claimed shall exceed one hundred dollars; and the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction."

The balance of said section deals with appeals to the Supreme Court of the Territory, and from the Supreme Court of the Territory to the Supreme Court of the United States.

The Organic Act contains no other provisions relating to the territorial courts, or to restricting the power of the territorial legislature to enact such laws upon the subject of escheats as it considered proper. It is not claimed that the territorial probate statutes were vetoed or disapproved by congress, as provided for in Section 6 of said act. The entire claim, therefore, that the territorial legislature was without power to legislate upon the subject of escheats, is based upon the restriction found in Section 6, *supra*, that no law should be passed interfering with the primary risposal of the soil. Congress, it should be remembered, had never passed any act dealing with escheats. There was then, as there is now, no Federal law upon that subject. Clearly congress never intended, by said restriction, to prohibit the Act of 1862 dealing therewith. The restriction was intended by congress to prohibit the territorial legislature from passing any law interfering with the authority of congress, and of the

federal laws, to direct the manner in which the public domain of the United States should be disposed of to those settling upon it, or claiming it, under the public land acts. Where title has passed from the government the prohibition ceases.

Oury et al. vs. Goodwin, 26 Pac. 376 (Ariz.).
Topeka Commercial Security Co. vs. McPherson, 54 Pac. 489 (Okla.).
Crane vs. Reeder, 21 Mich. 24.

The Supreme Court of Washington Territory, as well as this Court, has recognized the validity of the statutes of 1862 now under consideration, and the power of the territorial legislature to enact laws upon the subject of escheats.

Territory vs. Klee, 1 Wash. 183.
Pacific Bank vs. Hanna, 90 Fed. 72.

No one can be said to have a vested right in the common law, or the rules fixed by it for the descent, distribution or escheat of the estates of deceased persons. Legislative authority wherever found has always been considered competent to alter, change or abolish the common law. The disposal of escheats is certainly one of the proper subjects of legislation within the meaning of the Organic Act creating the several territories. Most significant in proof of this is the fact that every territorial government, including Washington, though all subject to the restriction imposed against enacting statutes, interfering with the primary disposal of the soil, have exercised the power, and passed statutes dealing fully with the subject. Such acts have changed the common law rules of descent in most instances, and if the United States government ever stood in the

role of "lord paramount of the soil" this is not the first time where the territorial statutes have cut off the reversion and separated said "Lord" from his own.

No one has a vested right to inherit the property of an ancestor until such interest becomes fixed by death. The law can cut off a mere expectancy, and if the rule be followed to its logical conclusion, it is not difficult to see where the legislature of the territory found ample authority to pass the Probate Practice Act of 1862.

Plaintiff in error cites some cases on the alleged right of the government of the United States to claim the escheat, and also some purporting to hold with him in his contention over the restriction on the primary disposal of the soil. These cases were cited to the trial court and held "not in point." This mildly puts the truth about them, for they fail to sustain the position of plaintiff in error in the slightest. They deserve no further mention. Clearly the power to enact legislation upon the subject of escheats was a matter which congress intended to, could, and did leave with the territorial legislature.

Hamilton vs. Brown, 161 U. S. 261; 40 L. Ed. 691.

Crane vs. Reider, supra.

The claim is also made by plaintiff in error that the title of the Probate Practice Act of 1862 is insufficient to cover the matters embraced in said act. The Organic Act contained this restriction:

"To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other,

every law shall embrace but one subject and shall be expressed in the title ''

The trial court held that

"Mere lapse of time and a proper regard for the stability of titles forbid an inquiry into this question at this late day. All our probate laws have been enacted under similar titles, their validity has been recognized by the courts, and acquisced by the people, for upwards of half a century, and to overthrow them now would unsettle half the titles in the state. Furthermore, if the question were a new one the objection is not tenable. It is conceded that the provision relating to the distribution of estates is within the title, and, if so, it is but a short step to provide to whom distribution shall be made; otherwise, the provision for distribution itself would be wholly inoperative.''

Plaintiff in error did not quote the last observation made by the trial court in referring to this feature of the opinion. It is a good answer to the objection. Certainly statutes dealing with the probate, descent and distribution of estates, and covering the contingency of a failure of heirs, have a "proper relation to each other.'' They deal with the same general subject, that is, the disposal of the estate of deceased persons. The act, therefore, covers but one subject and the title is descriptive of it.

The last objection over the grant of authority to the probate court is also easy to answer. The Organic Act did not define the jurisdiction of said court. Only by indirection does the Act limit the power of the territorial legislature to give to the probate court such jurisdiction as it might see fit to grant. It provided that the district courts and the

Supreme Court should exercise chancery and common law powers. Outside of this very general restriction, the Organic Act contains nothing which curtailed the power of the legislature to deal fully with that subject. It does not prohibit the territorial legislature from granting to the probate court the power to declare escheats, or to exercise full jurisdiction thereover. It contains a provision prohibiting justices of the peace from exercising jurisdiction over controversies affecting title to land, but no such provision is found respecting the probate court.

We do not say that the territorial legislature could confer either common law or chancery jurisdiction upon the probate court. Said court was to exercise the ordinary functions of such courts.

Perris vs. Higley, 22 L. Ed. 383; 20 Wall. 375.
Robinson vs. Fair, 128 U. S. 53; 32 L. Ed. 415.
Clayton vs. Utah Territory, 132 U. S. 632; 33 L. Ed. 455.

The powers of the legislature to grant said court the right to settle the estates of deceased persons, to designate who the heirs were, if any, and their respective shares; to reject claims of heirship, and find that the deceased had died intestate, and without heirs, does not call for the exercise of either common law or chancery powers, as probate jurisdiction is viewed in the United States. The power was conferred upon the probate court by the legislature of 1862, and was exercised by said court during the full life of the territory. The same power is exercised by the probate courts of the State of

Washington, and done, not under new statutes, but by virtue of the act now under consideration, and of the identical statutes involved. Beyond the confines of the state, we venture to say, the law of escheats is exercised by the probate courts. We know it is in many of them. It is common to American jurisprudence.

The case of *Maynard vs. Hill,* 125 U. S. 190, 31 L. Ed. 654, is of aid here. The Supreme Court was considering the validity of an act of the territorial legislature of Oregon of 1852, granting a divorce.

"A long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained."

Except as restricted by the Organic Act and the Federal Constitution, the powers of the territorial legislature were held as plenary in their nature as those of the state legislature.

"The theory upon which the various governments or portions of the territory of the United

States have been organized, has been that of leaving to the inhabitants all of the powers of self-government consistent with the supremacy and supervision of national authority and with certain fundamental provisions established by congress."

Acts of the territorial legislature are to be deemed valid unless disapproved by congress.

> *Clinton vs. Englebricht,* 13 Wallace 434; 20 L. Ed. 659.

It should be borne in mind while considering the several objections that the territory was not a municipal corporation, but a quasi state, and as such exercised legislative, and all other common governmental functions and powers. The state does not exercise many additional functions, and there is, in substance, but little difference between the two. This is strictly true as to the powers involved in this suit as exercised by the territory. The territorial government is of course a derivative government, and had such powers as were not prohibited by the Federal Constitution and Organic Act.

The purpose of congress was to confer as large a measure of self-government in local matters as was consistent with certain well-considered principles and restrictions. Viewed in this light, all legislative acts should be upheld by the courts, unless plainly prohibited, and such is the settled policy. *(Maynard vs. Hill,* 12 U. S. 190, 31 Law Ed. 654, *supra).* Especially is this true after the lapse of half a century, where the acts in question have been upheld by the courts and acquiesced in by Congress during territorial days, and by the general public ever since.

The sole question then remaining on this branch of the case is: What did the territorial legislature provide by statute in respect to the escheat of property of deceased persons dying intestate and without heirs? Did the territorial probate court have jurisdiction and authority under said territorial statutes to escheat the property to King County?

Probate law was first considered by the territorial legislature of 1854. The act of said date covered quite fully matters of practice and procedure, and fixed the authority of said court. However, the legislature of 1862 re-enacted the laws dealing with the descent and distribution of estates, and in the new act again defined the jurisdiction of said court, and the method of procedure therein. We would ask the court not only to examine the references to said code made herein, but to carefully read the entire act. An examination of said act will show that the law of that date was as complete upon the questions involved as is the probate law of today. Its details were all fixed by specific statutes.

We have cited the court to the case of *McGee vs. Big Bend Land Company, supra*, wherein the Supreme Court had occasion to comment upon the nature, character and jurisdiction of the territorial probate court. That opinion is based on the following statutes

Section 3 of Chapter 1, page 198, of said act, deals in a general way with the jurisdiction of said court.

"Sec. 3. That said probate courts shall have and possess the following powers: Exclusive original jurisdiction within their respective counties in all

cases relative to the probate of last wills and testaments; the granting of letters testamentary and of administration, and revoking the same; the appointment, and displacing guardians of orphan minors, and of persons of unsound mind, and the binding of apprentices; in the settlement and allowance of accounts of executors, administrators and guardians; to hear and determine all disputes and controversies between masters and their apprentices; to allow or reject claims against estates of deceased persons, as hereinafter provided; to award process, and cause to come before said court all and every person or persons whom they may deem it necessary to examine, whether parties or witnesses, or who, as executors, administrators, or guardians, or otherwise, shall be entrusted with, or in any way be accountable for any lands, tenements, goods or chattels, belonging to any minor, orphan, or person of unsound mind, or estate of any deceased person, with full power to administer oaths and affirmations, and examine any person touching any matter of controversy before said court, or in the exercise of its jurisdiction. * * *

"Sec. 4. The said court shall provide and keep a suitable seal.

"Sec. 5. That the court established by this act shall be a court of record, and shall keep just and faithful records of its proceedings, and shall have power to issue any and all writs which may be necessary to the exercise of its jurisdiction.

"Sec. 7. The judges of the several probate courts in the territory shall have power to appoint their own clerks, who shall qualify in the same manner and have the same power, and be entitled to the same fees as are allowed to the clerks of the district courts for similar services.

"Sec. 8. The judges of the said courts shall have power to make such rules for the transaction

of business in said courts as shall not be inconsistent with law.

"Sec. 10. That all process issuing out of the probate court shall be attested by the clerk, and sealed with the seal of the court, and shall be served in the same manner as process issuing out of the district court.

"Sec. 11. That the probate court shall have the same power and authority under like restriction and rules of law, to enforce and execute their orders, rules, judgments and decrees, as the district courts of this territory.

"Sec. 12. That said court may enforce by attachment the return of any writ or process, and the payment of any moneys over which it has jurisdiction, and to compel the production or delivery of any papers which are subjects of, or necessary to its judicial action."

These sections and other provisions of said act established the nature and character of said probate courts. Practice in the probate court was to conform, as nearly as possible, to the method of practice in the district courts, and the several chapters following the one mentioned deal entirely with the different features of the powers of said court, and things necessary to be done by it in probating and closing up the estates of deceased persons.

Chapter 14 of said act deals with the conveyance of real estate by executors and administrators in certain cases. By this chapter the probate court was given jurisdiction to order the specific performance of the contract of deceased persons. Authority was granted to said court to convey by decree.

Chapter 15 deals with the accounts to be rendered by executors and administrators and the pay-

ment of the debts of the deceased.

Chapter 16 of said act covers the partition and distribution of estates, while Chapter 17 legislates with reference to descent.

Chapter 18 covers the distribution of personal estates.

Chapter 21 contains miscellaneous provisions relating to appeals from the probate to the District and Supreme Courts.

The following sections of Chapters 16 and 17 conferred authority upon the probate court to escheat the Thompson estate (special attention being called to Sections 317, 318 and 319, upon which defendant in error relies):

"Sec. 309. At any time, subsequent to the second term of the probate court, after the issuing letters testamentary or of administration, any heir, legatee, or devisee may present his petition to the court, that the legacy, or share of the estate, to which he is entitled, may be given to him upon his giving bonds with security for the payment of his proportion of the debts of the estate."

"Sec. 310. Notice of the application shall be given to the executor or administrator, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of the executor or administrator.

"Sec. 311. The executor, administrator, or any person interested in the estate, may appear and resist the application; or any other heir, legatee, or devisee may make a similar application for himself.

"Sec. 312. If, on the hearing, it appear to the Court that the estate is but little in debt, and that the share of the party of parties applying may be allowed without injury to the creditors of the estate,

the Court shall make a decree in conformity with the prayer of the applicant or applicants: Provided, each one of them shall first execute and deliver to the executor or administrator a bond in such sum as shall be designated by the probate court, and with sureties to be approved by the judge thereof, to the executor or administrator, conditioned for the payment by the devisee or legatee, whenever required, of his proportion of the debts due from the estate.

"Sec. 313. Such decree may order the executor or administrator to deliver to the heir, devisee, or legatee the whole portion of the estate to which he may be entitled, or only a part thereof.

"Sec. 314. If, in the execution of such decree, any partition be necessary between two or more of the parties interested, it shall be made in the manner hereinafter prescribed.

"Sec. 317. Upon the settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee, or legatee, the Court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled.

"Sec. 318. In the decree the Court shall name the persons and the portion or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession.

"Sec. 319. The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The Court may order such further notice to be given as it may deem proper.

"Sec. 331. When the probate court shall make a decree assigning the residue of any estate to one or more persons entitled to the same, it shall not be necessary to appoint commissioners to make partition or distribution of such estate, unless the parties to whom the assignment shall have been decreed, or some of them, shall request that such partition be made.

"Sec. 332. All questions as to advancements made, or alleged to have been made by the deceased to any heirs, may be heard and determined by the probate court, and shall be specified in the decree assigning the estate, and in the warrant to the commissioners, and the final decree of the probate court, or in case of appeal, of the district or supreme courts, shall be binding on all parties interested in the estate."

Subdivisions 1 to 8 of Section 340 (Chapter 17, page 261) provided for the descent of the real estate of deceased persons.

Subdivision 8 of said section reads as follows:

"8th. If the intestate shal leave no kindred, his estate shall escheat to the county in which such estate may be situate."

We have previously argued that the probate court acquired jurisdiction over the estate of John Thompson. In the exercise of that jurisdiction, it was granted the power to proceed against all persons and to distribute the estate according to the facts before it.

The statutes of 1862 contained provisions for constructive service upon those interested, or claiming an interest, in an estate before the court for distribution.

Section 319, *supra,* quoted, provides that the same notice on distribution should be given as was required by said act, for the sale of land by an executor or administrator.

Section 228 of Chapter 12, page 241 of said act covers the notice required for the sale of real property:

"Sec. 228. When a sale is ordered, notice of the time and place of sale shall be posted in ten of the most public places in the county where the land is situated, at least twenty days before the day of sale, and shall be published in some newspaper in this territory, in general circulation in said county, for three successive weeks next before such sale, in which notice the lands and tenements shall be described with common certainty."

It is not contended that the notice provided for by this section was not given when the matter of the distribution of the Thompson estate came on for hearing. The records affirmatively show that said notice was published and given in accordance with law.

No one contends at this late day that courts do not have, or should not have, the power to effectively proceed, under certain circumstances, to adjudicate the status of claims against property, and the status of property by constructive service. A probate proceeding is in the nature of a proceeding *in rem.* All the world is a party to it when the notice is published as required by the statutes. Anyone having or claiming an interest in the estate is charged with the solemn duty to make known that claim, or that interest, or stand forever barred. It

is fundamental that the court should have this power to distribute by constructive service. It would be impossible to administer upon property, and fix the title of the estate, unless such powers were granted and exercised. The Court having no power to go beyond the limits of the territory or state to proceed by personal service would find its hands effectively tied unless it could give notice of its intention by publication. A decree of a probate court based upon statutory constructive notice is good as to the property under the jurisdiction of the court, and upon which it is proceeding to exercise its probate authority. If the territorial probate courts, provided for in the laws of 1862, did not have the authority to proceed by constructive service, then the courts of Washington today do not have it. We will assume as conceded that the probate court having acquired jurisdiction over the estate of John Thompson, deceased, could proceed to exercise that jurisdiction, in the manner pointed out by law, until it was exhausted by a final decree. How can it be said that the court did not have power to decree according to the facts which were before it after the notice given for distribution? Certainly the language of Sections 317 and 318, *supra,* are broad enough to confer such power. The Court shall "proceed to distribute the residue of the estate, if any, among the persons who are by law entitled. * * * In the decree the Court shall name the persons and the portions or parts to which he shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator or any person having the same in possession."

These provisions, taken in connection with subdivision 8 of Chapter 17, *supra*, grants authority to that Court to decree in favor of King County should it find, as a matter of fact, which finding it made, that John Thompson died intestate and without heirs.

We have examined the statutes in force at that time exhaustively, and, without fear of contradiction, say there are no other statutes in any way modifying the power or jurisdiction of the probate court as it was conferred by the sections above quoted. We have compared the sections quoted with those on the statute books of Washington today and find them almost identical in their language, as well as in the subject matter covered.

If the Court should desire to make this comparison it will find that Section 309, *supra,* is identical in substance with Section 1579 of Remington & Ballinger's Code; Section 310 with Section 1580; Section 311 with Section 1581; Section 312 with Section 1582; Section 313 with Section 1583; Section 314 with Section 1584; Section 315 with Section 1585; Section 316 with Section 1586; Section 317 with Section 1587; Section 318 with Section 1588. These sections from the code cover the descent, distribution and escheat of estates under our law today.

In short, it is our contention that the territorial probate court had as specific and clear authority to enter the decree in the case of John Thompson as the present Superior Courts to decree an escheat have when sitting as probate courts.

Jurisdiction over the estate of a deceased person and the escheat thereof, should it be found that said person died intestate and without heirs, has always been exercised by the probate courts of Washington State and Territory. This is clearly shown not only by decisions of the Supreme Court of the State of Washington, but by legislative declarations of law made in subsequent acts.

In the laws of 1907 (Rem. & Ball. Code, Section 1356, *et seq.)* the legislature recognizes that the matter of declaring escheats has always been left with the probate court, and that title rests by operation of law. The only change which the Aact of 1907 made in the law was granting an extension of time to the heirs to appear and lay claim to the estate. It did not change the method or notice by which they were brought into Court or the length of time which such notice should be published. The act changed the law by providing for an extension of six months additional time before said Court could proceed to declare an escheat of the estate. This time did not run after notice, but must elapse before notice of distribution can be published.

In the *Sullivan estate case,* 48 Washington 631, the Supreme Court entertained a petition of intervention by King County seeking to declare an escheat of Sullivan's estate because it was claimed Sullivan died intestate and without heirs. The jurisdiction and authority of the probate court to declare an escheat has been recognized by every decision of the state courts where the question has come up for consideration. The probate courts of the state today having that authority, when was it

conferred, if not by the Act of 1862, now under consideration? Furthermore, that this power was to be exercised by the probate court is confirmed, as pointed out in the opinion of the learned trial court, by the provisions of law relating to the distribution of the personal estate of such person.

Subdivision 7 of Section 353, being Chapter 18, page 265, of said Act, reads as follows:

"7th. If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the county in which the administration is had, and a receipt by the county treasurer of the county to whom the said personal property shall be conveyed by the administrator shall be a full discharge of all responsibility to the said administrator."

This clearly indicates that the territorial legislature intended that the administrator in charge of said estate, under and subject to the authority of the probate court, should turn the personal property escheating over to the county officials and receive his discharge thereby.

Counsel for plaintiff in error have contended to this Court, as they did to the Court below, that it was necessary before said estate could be escheated that some proceeding in the nature of an inquest of office, or an office found proceeding, be brought in some court other than the probate court, to adjudicate upon the question of whether or not John Thompson died leaving no heirs at law. For purposes only known to themselves, they have cited this Court to Section 480 of Chapter 52 of the Session Laws of 1854, page 218, by whose provision it is

claimed it became the duty of the prosecuting attorney to file an information escheating the estate of deceased person dying intestate and without heirs to the territory. This "information," according to their contention, must be in the district court of the county where the property is situated. It is astonishing to us that counsel should cite this statute, for, as pointed out in our brief to the trial court, and in the opinion of the trial court, the portion of said statute relating to the escheat of estates was repealed in 1862 by an act of that date. In the first place, the laws of 1854 relating to the escheat of the estate of deceased persons dying intestate and without heirs was changed so that after 1862, instead of going to the territory, it went to the county where the estate was situated.

Subdivision 8 of Chapter 306, Laws of 1854, read:

"8th. If the intestate shall leave no kindred his estate shall escheat to the territory."

This was changed by the laws of 1862:

"8th. If an intestate shall leave no kindred his estate shall escheat to the county in which such estate may be situated."

This change is also noted in the law relating to the personal estate. Laws of 1854, Sec. 244, page 308, Sub. Sec. 7, read:

"If there be no husband, widow, or kindred of the intestate, the whole shall escheat to the territory."

But no provision in the laws of 1854 required the administrator to pay the money over to the territory.

The prosecuting attorney, by information, could not file a suit and have said estate escheat to the territory after 1862.

But the statute of 1854, as we have said, was expressly repealed by the Civil Practice Act of 1862, dealing with the same subject of "information."

Each of the several sections of the later act covered the identical subject matter contained in the sections of the previous act. (See Sec. 480, Chap. 52, Laws of 1854, p. 31, brief of plaintiff in error.) Section 519 of said later act dealt with the question of forfeitures. It omitted all reference to escheats and read as follows:

"Whenever any property shall be forfeited to the territory for its use, the legal title shall be deemed to be in the territory from the time of the forfeiture; and an information may be filed by the prosecuting attorney in the district court for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in a civil action for the recovery of property."

The Civil Practice Act of 1854 and 1862, as well as the Probate Practice Acts of said dates, were complete acts in themselves, and the chapter on information covered the same subject matter of all previous enactments fully.

Section 547 of the Civil Practice Act of 1862, page 197, provided:

"All acts or parts of acts heretofore enacted upon any subject matter contained in this act, be and the same are hereby repealed: Provided, that

rights acquired in actions now pending under existing laws shall not be affected by anything herein contained."

The contention of plaintiff in error that the local statutes in force in 1865 at the time of John Thompson's death made provision for an inquest of office is unfounded and misleading. It is based upon statutes that were repealed. In fact, the entire law on the subject had been changed.

We repeat that from the time of the passage of the law of 1862 down to the present date, the matter of escheats have been passed upon exclusively by the probate courts. Such matters have never been passed upon by any other court, and counsel cannot point to a single case where the proceeding testing or dealing with questions of escheats were not had in the probate courts, in the probate proceeding, and prior to the distribution. Under the present practice the attorney general of the state appears in the probate proceedings by motion or petition, after the time provided for by Section 2 of the Act of 1907, referred to *supra,* and asks the probate court to escheat the estate to the Sate of Washington for the benefit of the common school fund. That is the practice today, and the records, quoted by plaintiff in error from the probate proceedings in the estate of John Thompson, shows that the county authorities proceeded to do very much the same thing in securing the escheat of said Thompson's estate. The matters plead in the complaint from the records show that the Board of County Commissioners filed an affidavit in the probate court setting forth that John Thompson died intestate and without heirs, and they directed the prosecuting attorney to pro-

ceed to have said facts adjudicated and an escheat of the estate declared in favor of the county. We shall hereafter cite authorities and deal with the question of the conclusiveness of the decree entered in the Thompson case based as it was upon constructive service. It is our contention that under the statutes of 1862 in force at the time of Thompson's death, the estate escheated as a matter of law, upon the determination by the probate court that he died intestate and without heirs.

This court held, in passing upon the question of an escheat, in the case of *Pacific Bank vs. Hanna,* 90 Fed., page 72, *supra,* that where a person died intestate and without heirs, the property of such person escheated to the county whre situated.

"By the death of James H. Givens, intestate and without heirs, his widow not being, as has already been seen, his heir at law under the laws of Washington, his estate escheated to the County of Pierce."

In the case of *Territory vs. Klee,* 1 Washington, page 187, the Supreme Court was considering the same territorial statutes:

"The only law in our statutes on the subject of escheats is contained in Section 3302, subdivision 8 of the code, which is as follows: 'If the decedent leaves no husband, wife or kindred, the estate escheats to the territory for the support of common schools in the County in which the decedent resided during his life time, or where the estate may be situated. * * *' There is no direct allegation in the complaint that Charles Gilbert died leaving no wife or kindred, but the decree of the probate court of Pierce County so stated, as therein et forth, and it is al-

leged that appellant, by virtue of this decree, became the owner of the land now in dispute. Whether this be true or not, will depend upon the validity of the decree itself. Appellant contends that it is not valid or binding upon them, in any manner whatever, in this action. They claim that the court had no jurisdiction or authority to render it. And they insist that the probate court of King County had exclusive jurisdiction of Gilbert's estate by priority of probate proceedings therein, and that the probate court of Pierce County wrongfully and unlawfully assumed to act in the matter. We think the objection is a valid one, and must be sustained. Where the estate of the deceased is in more than one county, he having died out of the territory, our statute expressly provides that the probate court of the county in which application is first made for letters of administration shall have exclusive jurisdiction of the settlement of the estate. * * * Whether appellees have any title to the disputed premises we will not undertake to say. But we will here state that we are of the opinion that if the territory is the owner of the land, the title vested in it immediately on the death of Gilbert, without the aid or intervention of the probate courts."

Under these decisions it appears beyond dispute that, by the local law of the Territory and State of Washington, one dying intestate and without heirs, his estate escheats as a matter of law without any inquest of office.

Section 3848 of Remington & Ballinger's Code aids us by showing a legislative declaration that this was the law of the Territory of Washington. It was passed by the territorial legislature of 1883.

"The county commissioners of the several counties of this state be and they are hereby authorized and empowered to sell and convey at public sale, for

cash or on credit, in such manner as they may deem advantageous, any real estate or other property which may have escheated to the county by operation of law."

This seems to bear out the uniform application of the law by the courts.

Counsel for plaintiff in error do not cite any authorities or statute which would tend to overthrow the contentions here advanced. They cite no local authorities on this question at all, and the statutes mentioned by them have been repealed. They, however, do go back to the musty pages of history and cite some authorities from other jurisdictions, which they claim sustain their contention that before an adjudication can be made by the court that a person died intestate and without heirs, it is necessary that an inquest of office or an office found proceeding be brought.

The common law of the United States dealing with this question is not the same as it was in England prior to the time of the revolution. Escheats and forfeitures under the law of England, it seems, could take place for numerous causes, many of which do not obtain in the United States. Escheats in England went to the crown as the lord paramount of the soil, but in this country we have no feudal tenures, or that peculiar relationship which existed in England between the crown and the subjects owning lands and other property. The government of the United States, or of the several states, is not a paternal power over the subject and his property. For discussion of common law of England, see

Crane vs. Reider, 21 Mich 54; 4 Am. Rep. 430, *supra*.

In *Hamilton vs. Brown*, 161 U. S. 261, 40 L. Ed. 695, the Supreme Court said:

"By the law of England before the Declaration of Independence, the land of a man dying intestate and without heirs reverted by escheat to the king as the sovereign lord, but the king's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. (Citation.) The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, anyone claiming title to the lands might, by leave of that court, file a traverse, in the nature of a plea or defense to the king's claim, and not in the nature of an original suit. (Citation.) The inquest of office was a proceeding *in rem;* when there was a proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor. (Citation.) In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state."

In the State of Idaho they have a statute which provides that heirs claiming an estate must appear within a specified time and make known their claims, or it will escheat.

In *State vs. Stevenson,* 55 Pac. 886, an action was maintained to recover the possession of property. It appears that on Adolph Hempel died in

April, 1887, seized in fee of land in question "leaving no known heirs surviving him." Administration being had "no heirs or claimants have appeared and claimed said estate or any part of it," it was declared escheated to the State of Idaho. It was said that Hempel died leaving a sister surviving him residing in Austria. After the lapse of time fixed by statute for the heir to make known his claims, a question arose in the suit as to the meaning of the law of escheats. The Court said:

"Conceding the suggestion of counsel that the title could not remain in abeyance, where did it go when the non-resident foreigner could claim it no longer? We think it went to the state to be disposed of as provided by said Sections 5716 and 5717. In this country the general rule is that when the title to land fails for want of heirs it escheats to the state. That rule is applicable in this state. No non-resident foreigner here having appeared and claimed succession within five years after the death of Hempel, said real estate escheated to the state without an inquest in the nature of office found, to vest title in the state. The title passed by operation of law without court proceedings of any kind, as no proceeding nor inquest in the nature of office found is provided for by statute in such cases in this state."

In *Ellis vs. State,* 21 S. W., page 66 (Texas), it was announced:

"It seems to have been recognized in the days of Chancellor Kent, as a general principle of American law, and has been many times reaffirmed since, that whenever the owner dies without leaving any inheritable blood, the land vests immediately in the state by operation of law, and that no inquest of office is necessary in such a case. A different rule,

however, seems to prevail in case of a proceeding to escheat during the life of an alien, property which he has acquired by purchase; but when the death of the owner occurs and there is no person to take the estate as heir or devisee, it devolves *eo instanti* by operation of law upon the state."

Also see:

Montgomery vs. Darrion, 7 N. Hamp. 475;
Frye et al. vs. Smith, 32 Ky. Rep. 39.
Stokes vs. Daws, 4 Mason 268.
Sands vs. Lynham, 21 Am. Rep. 348, page 351.

In *Roberts vs. Reider,* 5 Neb. 203 (Brown), the law of that jurisdiction is announced:

"Hence, there can be no doubt that upon the death of the death of the tenant in fee, with defect of heirs, the title and right of possession to the land *eo instanti* vests absolutely and wholly in the state."

Plaintiff in error cites a number of authorities (Brief, pp. 32, 34) which, it is claimed, hold that at common law as understood in the United States, before an escheat can take place, there must be an inquest of office, or office found proceeding, to establish that deceased died without heirs. The authorities cited on this point are of no more aid to the court than is the reference, made by plaintiff in error, to the code provisions of 1854 (Section 480, Chapter 52, p. 218), which were repealed by an act of 1862, or three years before Thompson's death. Every one of these decisions depend upon statutes of the particular state, as a foundation, and not upon any principle of common law, as the same has been applied in the United States. We hope the

court will take time to read these authorities. They clearly demonstrate, as much as anything, that the case of plaintiff in error rests upon unsound contentions, and a strained application of the statutes and decisions.

We will review these authorities in the order cited:

State vs. Ames, 23 La. 69-71, was a case involving the right of the state to contest the validity of a will after probate. Plaintiff in error put "stars" in his quotation from the opinion where the Louisiana court refers to the "Fourth law of the Code of Justinian" as the basis for its conclusion. This decision is the only legacy, offered by plaintiff in error, from a jurisdiction where the civil law found application. It certainly has no bearing upon a controversy in the State of Washington where such system has never been recognized.

The money, *In re. Miner's Estate,* 76 Pac. 968 (Calif.) was paid into the treasury of the State of California by the administrator, and held on deposit by the treasurer, to the credit of the "estate of James Miner," for a number of years. It had never been used prior to the commencement of the suit in question, or considered as a part of the school fund of the state. The heirs claiming the funds were citizens of the United States and one of the questions involved was whether the lapse of the five year period specified as the time in which nonresident foreign heirs must appear and claim such funds, had application to the rights of the parties prosecuting the suit. The question also arose whether by the decree the probate court intended to

escheat the property to the state, or make its decree final in that behalf. On the last point it is said:

"But in this case the court did not distribute the fund in question to the state, as being entitled thereto under the law of succession or otherwise."

It appears from the opinion, that the California Code provides that the proceeds of an estate, where no heirs appear in the probate proceeding to claim it, must be placed with the state treasurer, and held for at least five years, after which time a proceeding may be prosecuted to have said funds escheat. This had not been done, so it clearly appears from the case, that the title to said fund was still in the heirs of Miner, if any appeared. The case is not in point and depends upon statutes for the expressions used. By the statutes of California it appears that the probate court could not in any event enter a final decree of escheat.

People vs. Roach, 18 Pac. 407, involved the same statute under consideration in the *Miner* case.

It seems that the Attorney General attempted, before the expiration of the five year period following the death of the intestate, to escheat the property. It was held that the case was premature. Citations from the State of California, in the light of their statutory provisions, cannot be of aid in determining the issues of the present suit.

Plaintiff in error quotes from *Wilbur vs. Tobey,* 33 Mass. 177, 16 Pick. 177, which case cites *Jackson vs. Adams,* 7 Wend. 367, and *Doe vs. Redfern,* 12 East 96.

In *Wilbur vs. Tobey* the court was considering an escheat to the commonwealth of Massachusetts. Massachusetts had a statute of escheats, as clearly appears from the opinion.

"By the St. 1791, C 13 Sec. 1, it is provided that when any judgment shall be rendered on any inquest of office, that the commonwealth be seized or reseized of lands, etc., they shall be deemed to be in fact seized to all intents and purposes."

Doe vs. Redfern is an English case, depending upon special statutes, and was decided in the fifth year of King George III. It requires no further comment.

The following quotation from *Jackson vs. Adams, supra,* discloses that said case depended upon special statutes of the State of New York:

"It did not vest (as in the case of a mere alien) upon his death, by force and operation of law in the state, but it descended to his heirs, if he had any; and the state had no right to enter upon, or dispose of the premises, until they had pursued the measures pointed out in the act concerning escheats, 1 R. L. 379, for ascertaining whether he had any heirs; if it was found that he had no heirs, these measures would necessarily result in giving the state a perfect title by escheats."

We could not find the case of *Hall vs. Gittings*, 2 Har. & J., 112-125. It must be a miscitation.

Wallahan vs. Ingersoll, 7 N. E. 519, is based upon a special act of Illinois, covering escheats. It is held in that case to be essential to the establishment of title by escheat in the state, that the title

be judicially ascertained by proceedings complying with the statutes thereon:

"The statute of 1845 (Rev. St. 1845, c. 38, p. 225), required, among other things, (1) the filing of an information by the attorney general or circuit attorney, alleging the names of *terre-tenants,* and persons claiming the estate; (2) the issuance and service upon such *terre-tenants* of a *scire facias;* and where there is no such allegation, and there is service upon but one of the parties named as occupants, the proceedings are fatally defective in both respects."

The case of *People ex. rel. Attorney General vs. Folsom,* 5 Calif. 373, is not in point. It pretends to announce nothing but the common law as understood in England, and this is *dicta* in the case. The action was a proceeding brought by the attorney general to escheat some property held by an alien (a distinguishing circumstance), and it was adjudged by the court, that if an escheat ever took place, it was while the territory was still under the control of the Mexican government, and that the right to enforce an escheat did not attach to the territory of California, as a successor of the Mexican government.

If counsel for plaintiff in error can gather any solace from the cases of *Peterkin vs. Inlois, University vs. Harrison, Chatham vs. State, People vs. Fire Insurance Company, and Hammond vs. Inlois,* cited, they should point same out to the court. We find nothing in these cases which touches the issues herein. Some of them might be of interest to a professional antiquarian, as relics of a by-gone jurisprudence, though the issues are so obscure, we

doubt their value for this purpose. Perhaps they were cited upon the theory that the claim presented by plaintiff in error is so stale and ancient it required old authorities to illuminate it.

The law in *Winders vs. State of Texas,* 64 Tex. 133, was announced while considering a decree of escheat under the special statute of Texas governing such matters. The method of prosecuting an escheat was covered by special legislation, *Brown vs. Hamilton, supra.* This case, as well as the others, brings home with particular force the observation made by the Supreme Court in *Brown vs. Hamilton,* that the law of escheats in this country depended upon local statutes. In some cases it goes to the state by operation of law without an inquest, and in others only after an inquest. Out of all the cases cited there is not one which will aid the court, and it seems to us, that the contentions of plaintiff in error must stand weakened by relying upon, and citing this character of law. It shows that the suit and the contentions made, while ingenious, are without substance.

We contend that at common law, as the same has been applied in the United States, no office found proceeding is necessary. None was provided for by the laws of the territory, or now is by the State of Washington; but, on the other hand, it clearly appears that the jurisdiction to declare escheats was conferred by the legislature upon the probate courts to be exercised in the probate proceedings.

If the proceeding, however, is essential to the passage of title to the estate, it is equally necessary

where the deceased died leaving no heirs, and where he died leaving heirs who failed to appear and make known their claims. If the law of this state has been correctly announced in *Territory vs. Klee, supra,* and *Pacific Bank vs. Hanna, supra,* no proceeding is necessary, because the same vests in the county by operation of law.

We shall later show that under the decisions of the Supreme Court of the State of Washington the statutory notice provided for in closing the estate, and distributing the property is a final, and conclusive service upon all parties claiming an interest in the estate. Hence the same rule, without qualification, applies when one dies and the heirs have been foreclosed, that is, the law fixes where the escheat shall go, and it does so instanter upon said finding being made. The construction sought by defendant in error is aided by the fact that under the territorial statutes of 1862, title did not pass to the heirs at law or persons entitled to receive it until after decree by the probate court.

Our position is based upon Sections 317 and 318 of the Probate Practice Act, *supra,* and Section 225, providing that the executor or administrator shall take into his possession all the estate of deceased, real and personal, and collect all debts due deceased, and upon distribution deliver as directed by the decree. But the point is settled in favor of our contention by the Supreme Court of the State.

Balch vs. Smith, 4 Wash. 497.
Lawrence vs. Bellingham Bay, etc., Ry. Co., 4 Wash. 664.

This was the law of the territory and state until 1895, when the legislature passed an act (Sec. 1366 Rem. & Ball. Code) changing the time when title vests.

By the provisions of this later act, title vests instanter without probate proceedings. It changed the law in force at the time of the death and probation of John Thompson's estate.

We think this circumstance aids the construction sought herein by defendant in error, that it was for the probate court to fix the title of John Thompson's estate, and to decree it to those who by law were entitled to it; in case of an escheat, to the county.

Counsel for plaintiff in error contended, in the lower court, that the decree of distribution was not intended by the probate court to be a final decree, fixing the title of the estate. This contention is without foundation, as the decree will disclose. It recites that the estate has been fully administered and the residue, consisting of the property in suit, is ready for distribution. It also recites that the debts of deceased and of his estate, as well as the expenses of his administration, have been paid and that "the said estate is in condition to be closed." It then finds "that the defendant died intestate in the County of King * * * leaving no heirs surviving him."

In making this finding regarding heirs, we cannot say at this time what proof and evidence the Court had submitted to it. The decree recites that a hearing was had, and after a hearing the

final determination was made, that he left no heirs. In this proceeding the probate court is presumed to have passed upon the weight of evidence and to have given it his proper legal effect. The decree settles the issue by deciding it.

After making these recitals the probate court finds:

"No objection being made or filed, it is hereby Ordered, Adjudged and Decreed that all of the acts of the said administrator as reported to this Court, and as appearing on the records thereof, be and the same are hereby approved and confirmed."

The court, in making these findings, intended to discharge the administrator from further responsibility in the premises.

"That after deducting the estimated expenses of closing the estate, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter described, and now remaining in the hands of said administrator, * * * be and the same is hereby distributed as follows, to-wit: the entire estate to the County of King, in Washington Territory."

This language is then followed by a particular description of the residue of said estate distributed under the decree. It seems to us this decree is an unconditional, unqualified and solemn judgment of the court. No language could be better adapted to the purpose of the Court in declaring the escheat as finally settled in the County of King. The decree intended to and did fix the title of the estate forever.

As regards the finality of such decree, the laws

of the territory, Section 332, Probate Practice Act of 1862, p. 259, provides:

"* * * and the final decree of the probate court, or in case of appeal, of the district or supreme courts, shall be binding on all parties interested in the estate."

The right of appeal mentioned in the above is governed by Chapters 21 and 22 of the Probate Practice Act of 1862, page 275.

Sections 412 to 416, said chapters, provide that appeals shall be taken within three months after the order or decree is entered.

It is not claimed in this case that the decree of the probate court was ever reversed or modified, or set aside by motion. Hence, for all purposes it has become final.

There remains for discussion but one question. Did the decree of the court foreclose the rights of the heirs to the John Thompson estate, and, hence, bar the rights of plaintiff in error? If the decree was within its jurisdiction, and made up due process, the claims are now barred by it.

In the case of *Lessee of Gregnon et al. vs. Astor et al.*, 11 L. Ed. 283. 2 Howard 319, the Supreme Court said:

"Jurisdiction has been thus defined by this court: The power to hear and determine a case is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action. * * * This is the line which denotes jurisdiction and its exercise, in cases *in personam*, where there are ad-

verse parties, the court must have power over the subject matter and the parties; but on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land. * * * All the world are parties. In the Orphans' Court, and all courts who have power to sell the estate of intestates, their action operates on the estate, not on the heirs of the intestate, a purchaser claims not their title, but one paramount. The estate passes to him by operation of law. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties which directs the title of the deceased. * * * The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is no constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description. Every requisite for either must appear on the face of their proceedings, or they are nullities."

In *Nash vs. Williams*, 87 U. S. 226, 22 L. Ed. 254, the Supreme Court declares the settled rule of law is:

"That jurisdiction having attached in the original case, everything done within the power of that

jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error."

As a general proposition, the law in this respect is too well ~~put~~ settled for controversy.

Simmons vs. Paul, 138 U. S. 439; 34 L. Ed. 1054.

Holmes vs. Ore.-Calif. Ry. Co., 5 Fed. 523.

Stoval vs. New Orleans, 6 Wallace 642; 18 L. Ed. 950.

Veach vs. Rice, 33 L. Ed. 163.

Fonergue vs. New Orleans, 59 U. S. 470; 15 L. Ed. 399.

The laws of the State of Washington providing for published notice on distribution have been held service upon the heirs, which will forever bar them from asserting claims not presented to the probate court. The entire matter is now *res adjudicata.*

In *Osland Estate,* 57 Wash. 359, the Supreme Court of the State of Washington had before it a judgment wherein it was

"Ordered, adjudged and decreed that the account be approved and settled, and that the property of said estate above described be and the same is hereby distributed to said Mons J. Osland, as his sole and separate property, and that said estate be and hereby is closed and settled."

Notice in this case was published in the manner specified in the statute. The property was dis-

tributed under a will which made no mention of children of deceased, as required by statute. The children failed to appear and the Court entered the decree of distribution as set out above. Later an action was brought by the children to have the decree of the Court settling the estate set aside. Of this decree the Supreme Court said:

"It is not contended that that decree has ever been reversed or modified, and of course it is apparent that the time for appeal therefrom has long since passed; neither is its effect sought to be avoided upon the ground of fraud. The contention that the Court, in rendering the decree, erroneously determined who was entitled to the property as distributed upon distribution of the estate of Elsie Oslund, goes only to the merits of the question before the Court, and is wholly foreign to the question of the jurisdiction of the Court to determine who was entitled to the property then being distributed. * * * The suggestion arises upon the findings above quoted that the want of personal notice given to the children of Elsie Oslund rendered the decree of distribution of no biding force as against them. Counsel for respondent does not seem to rest his contention upon this point, but upon the alleged invalidity of the will and the statute vesting title in the heirs immediately upon the death of the ancestor. However, a sufficient answer to any contention which might be made upon the want of personal notice is the fact that our statute does not require any such notice, but gives the court jurisdiction of the matter of distribution upon the application of an order to show cause directing all persons interested to appear."

The opinion cites Remington & Ballinger's Code, Sections 1499, 1500 and 1589, all of which sections were in force and effect in 1862, as we have above quoted them.

The contentions of plaintiff in error are plainly barred by the ruling of the Supreme Court in the Oslund case, for the respective contentions made by the claimants in the two cases cannot be distinguished.

In the case of *Broderick's Will,* 21 Wallace 503, 22 L. Ed. 599, the Supreme Court had a similar case before it for adjudication. Senator Broderick died in San Francisco in 1859. On the 20th of January, 1860, a will was presented and admitted to probate. Large claims were paid against the estate and a decree of distribution entered distributing to the devisees in the will. The action before the Supreme Court was brought by the heirs at law of said Broderick by a bill in equity in the Circuit Court of the United States, seeking relief against the decree of distribution on the ground that the will was a forged and simulated instrument. The action was not brought until ten years after Broderic's death. It was alleged, as in the case at bar, that the plaintiffs had no knowledge of his death or of the facts connected with the probation of his estate. A demurrer was sustained to the bill, which was affirmed by the Supreme Court. The intention of the probate court to distribute Broderick's estate was given by published notice. Of the powers of the probate court of California, the Supreme Court says:

"There is nothing in the jurisdiction of the probate courts of California which distinguishes them in respect of the questions under consideration from other probate courts. They are invested with the jurisdiction of probate of wills and letters of administration, and all cognate matters usually inci-

dent to that branch of judicature. * * * In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth. * * * It needs no argument to show, as it is perfectly apparent, that every objection to the will or the probate thereof could have been raised, if it was not raised, in the probate court during the proceedings instituted for proving the will, or at any time within a year after probate was granted, and that the relief sought by declaring the purchasers trustees for the benefit of the complainants would have been fully compassed by denying probate of the will. On the establishment or non-establishment of the will depended the entire right of the parties, and that was a question entirely and exclusively within the jurisdiction of the probate court. * * * The probate court was fully competent to afford adequate relief, but the complainants allege that, in consequence of circumstances beyond their control, and without their fault, they had no knowledge of the forgery of his will until within three years prior to the commencement of this suit, and after the period for contesting the will in the probate court had expired and when the power of said court to investigate the subject further had ceased. * * * What excuse have they for not appearing in the probate court, for example? None. No allegation is made that the notices were fraudulently suppressed, or that the deat hof Broderick was fraudulently concealed. The only excuse attempted to be offered is that they lived in a secluded region and did not hear of his death, or of the probate proceedings. If this excuse could prevail it would unsettle all proceedings *in rem.* * * * They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his

estate, until many years after these events transpired. Parties cannot thus by their seclusion from the means of information claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem.*"

Our position is most clearly stated in the opinion of the Court in *William Hill Co. vs. Lawler,* 48 Pac. 323, where the word "distribution" is defined:

"A proceeding for distribution is in the nature of a proceeding *in rem*, the *res* being the estate which is in the hands of the executor under the control of the Court, and which he brings before the Court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute, the entire world is called before the Court, and the Court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the Court for determination, whether he appear or present his claim, or fail to appear, the action of the Court is equally conclusive upon him, subject only to be reversed, set aside, or modified on appeal. The decree is as binding upon him if he fail to appear and present his claim as if his claim after presentation had been disallowed by the Court."

Holding with the above authorities we call attention to the following:

McGee vs. Big Bend Land Co., supra.
Proctor vs. Diglow, 45 Pac. 86 (Kan.).

Langdon vs. Blackburn, 41 Pac. 814 (Calif.).
Fitzpatrick vs. Simonson Bros. Mfg. Co., 90 N. W. 378 (Minn.).

An escheat is not a forfeiture, nor analogous thereto. A forfeiture occurs for some breach of a penal statute. It is invoked essentially as a penalty. An escheat under the laws of the Territory and State of Washington since 1862 has been nothing more, nor different, than a rule for the distribution of estates under certain conditions. By the laws of 1862 a forfeiture went to the territory, and escheats to the county. An escheat was found by the probate court, while a forfeiture could be declared only by the district court after an information had been filed by the prosecuting attorney, and proof taken. Personal service within the jurisdiction appears necessary for a valid decree of forfeiture, but an escheat could be decreed only after notice by publication, as specified by statute. The change in the nature of the proceeding of escheat took place by a modification of the code of 1854, as above indicated. The purpose of the legislature in making the change seems clear, for it affected not only the result reached but the method employed, and this is as true of real as it is of personal estates. By the theory of plaintiff in error the prosecuting attorney would invoke the aid of a forum which had no jurisdiction, and attempt, by an information, to secure an escheat to the territory where by law it could not go.

The uniform construction of the law by the courts for fifty years cannot be overthrown by the jumble of incoherent assertions advanced by plaintiff in error. Nor will the law thus settled be

turned upside down by some theory of land tenures coming down from the dust of antiquity, and seeking an application in this country where the system itself never had any existence. The doctrine of the right of the "lord paramount of the soil" will have to give way to statute law, suited to conditions, and of modern origin.

Without a statute or modern decision to back his cause, we can see good reason for the desire of plaintiff in error to tear up the code of 1862. By the plain meaning of these statutes his case fails him, and he stands defeated at the very threshold of his suit.

By the code, the county stood eight in the line of succession to the Thompson estate. None of the seven classes possessing higher rights appearing, King County asserted its claim. The county moved for an escheat, alleging that there were no heirs. This question thereafterward stood as an issue of fact before the probate court, undenied. That court gave the statutory notice to all persons claiming as heirs to come in and deny the claims of the county. None appeared, however, and so the probate court forever settled the issue tendered, by deciding that John Thompson died intestate and without heirs.

Now, why should not this finding, and the decree based thereon, be conclusive? It is conceded that the probate court could find adversely as between contesting heirs, or between the heirs claiming and those failing to appear and claim the estate. The court could find in favor of class number two in the schedule of descent, to the exclusion of class number one. It could find in favor of number seven

to the exclusion of the six higher. Why should it require some higher or extra action to find in favor of number eight, to the exclusion of the seven other classes? We say it requires none. If a decree based upon statutory notice bars the adverse and conflicting claims between heirs, a similar decree based on a similar notice, will, as effectively, bar the claim of any and all the heirs.

There is one feature of the argument which plaintiff in error overlooks. It is unnecessary for the decree of the probate court to specify in express terms where the estate shall go if the intestate leaves no heirs. The estate goes to the county by operation of law, without the aid or intervention of the probate court.

Territory vs. Klee, supra.
Pacific Bank vs. Hanna, supra.

The vital link in the claim of the title is not the part of the decree ordering an escheat, but that part of the record which leads up to and supports the finding that Thompson left no heirs. This is a finding upon a question of fact which concludes the matter for all time. Surely it will not be claimed that the question of heirship is not for the probate court. But whether it is or is not, the claims of plaintiff in error are barred by said finding. What does it matter to him now where the escheat went? It went by operation of law to some authority the instant said finding was made. The law fixed its owner, and his title, and in the face of the finding it matters not to plaintiff in error. Let it be to the United States, to the territory, or, as fixed by the code, to the county, or whithersoever it will. Plaintiff in error must recover on the strength of his own

claim, and he has none; the result to him is always a zero, for his suit is barred by the finding of the probate court.

In the face of these authorities adjudicating the sufficiency of published notice as a lawful service and the finality of the decree based thereon, this Court should give effect to the provisions of the probate law, wherein it is declared:

"The court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled, and in the decree the court shall name the person and the portion or parts to which each shall be entitled."

This provision, taken in connection with the section declaring that "if the deceased shall leave no kindred his estate shall escheat to the county where situated, marking as it does the descent of property in case no one of the heirs appear and make known their claim, upholds in all its features the contentions of defendant in error that the decree of the Court escheating property to King County was within its jurisdiction and now constitutes a bar to this action.

PROPOSITION "B."
THE STATUTES OF LIMITATION HAVE RUN AGAINST THE RIGHTS OF PLAINTIFF IN ERROR.

Plaintiff in error gives four reasons why it is claimed the statutes of limitations do not bar his suit:

(a) As a first reason it is said the possessory acts of the county infringe upon the constitutional inhibition against taking property without due process of law. As a proposition independent of the validity or invalidity of the decree of the probate court, this contention is absolutely without merit, and said provision of the Federal Constitution has no application to this case. If the decree is void it falls as a source of title in itself unless cured by lapse of time. But if valid, or void, under well-established principles of law, if the statute has run, there has been a due process of law and the constitution has no application. The contention, as applied to the statutes of limitation and their effect, is surely without merit. No lawyer can sincerely urge it to the Court as a defense. The due process clause of the constitution in no way prevents the passage and enforcement of general statutes of limitation, for such statutes, founded as they are upon a wise public policy, have always been upheld by the courts, and where rights have become fixed through lapse of time and their application, due process of law within the meaning of the constitution has been had.

(b) It is said, as an additional reason, that the acts of possession are all *ultra vires.* No *ultra vires*

act is pleaded in the complaint, and the Court is left in darkness as to why this claim is made. The statute of descent said that the county should take in case no heirs appeared to lay claim to the estate. It is said the county has used it for a poor farm and hospital. Caring for the county poor and providing a hospital for their treatment has always been a county purpose, and public money and property could lawfully be used and spent for said purpose. In the Territory and State of Washington it is made so by statute.

We quoted Section 3848, Remington & Ballinger's Code, Territorial Laws of 1883, authorizing the county commissioners to sell property escheated to the county by operation of law. All the acts of possession plead, including the platting and sale of portions of property, have been acts authorized by statute, and hence we see no ground for saying that the acts of possession have been *ultra vires.* Beyond that, we do not think plaintiff in error, being a non-rsident and a foreigner, is in any position to raise the question.

(c) Another claim advanced is that the statutes have not run because the county has always recognized the existence of a title superior to its own. We have no quarrel with the authorities cited on this point by plaintiff in error. Apparently they are all good law for the matters before said Courts for adjudication. But the rules therein announced have absolutely no application to the premises over which they are cited. No facts are plead by plaintiff in error which will support his contention that the county has recognized a superior title in the heirs.

The facts plead show that the county commissioners in office at the time John Thompson died claimed by motion or petition in the probate court that he died intestate and without heirs. The county said he has no heirs and his property escheats by reason of that fact. This is the first time we have ever seen logic so twisted, that for one to deny the existence of a thing, or object, amounts to an admission of its existence. It seems to us, the facts plead show the position of the county to be diametrically opposed to that asserted by plaintiff in error. It is to be noted, however, that the petition filed by the county commissioners contains no conditions or admissions, and that the decree of the Court is an unconditional decree, and purports in clear and concise language to convey the full title to the county. Furthermore, the escheat statutes made no provision for holding property in trust for the heirs should they appear later.

(d) In a further contention, plaintiff in error claims that the decree of the probate court constitutes neither claim of right or color of title to the property in suit. This argument we will answer in our main contention on the statute of limitations. With the other contention as to the statute of limitations, we have no quarrel with the decisions that are cited by plaintiff in error. They have nothing in common, however, with the issues in this suit.

Statutes of limitation are not intended to protect an indefeasible title. There would be no excuse for their existence if they only protected that which, in law, was already good.

We need take no time in discussing the essen-

tials of title by adverse possession. It has been held by the Supreme Court of Washington in several cases that if the entry be under claim of right, or color or title, it is sufficient when followed by possession open, notorious, exclusive, continuous and adverse for the period fixed by law. In this case the county claims to have made its entry under both color of title and claim of right.

In *Wright vs. Mattison*, 18 Howard 50, 15 L. Ed. 280, color of title is thus defined:

"The courts have concurred, it is believed without any exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the validity of an apparent or colorable title; the inquiry with them has been whether there has been an apparent or colorable title, under which an entry or a claim has been made in good faith. * * * A claim to property, under a conveyance however inadequate might have been the power of the grantor in such conveyance to pass title to the subject thereof; yet a claim asserted under the provisions of such a deed is directly a claim under color of title."

This language is quoted with approval in *Cameron vs. United States*, 148 U. S. 301, 37 L. Ed. 459, and in this later case special emphasis is laid upon the fact that the ground of invalidity is unimportant, and that title will become fixed by the adverse possession if same is otherwise complete.

A void deed gives color of title in the State of Washington. *Ward vs. Higgins*, 7 Wash. 617, which case is followed in *Dibble vs. Bellingham Bay Land Company*, 163 U. S. 63, 41 L. Ed. 72.

It has also been settled by the courts that while the statute of limitations do not run against a state, they do run in favor of the state or any of its agencies, and the state having held property for the required time, its title becomes complete by adverse possession.

In *Eldridge vs. City of Binghampton*, 24 N. E. 462, the Court of Appeals of New York uses this language in dealing with this question:

"The statute under which the state acted in appropriating the land under consideration was either constitutional or it was not. If it was constitutional, as no question is raised as to the regularity of procedure, clearly the fee was acquired. If it was unconstitutional, as the state entered under color of title, and claimed to own the fee pursuant to a statute which declared that the fee simple of all the premises appropriated should be vested in the people, the absolute title was acquired by adverse possession. Title to land may be acquired by adverse possession either by an individual * * * or by the state, for the use of the public.

Mayor, etc., vs. Carlton, 113 N. Y. 293; 21 N. E. Rep. 55.

Sherman vs. Kane, 86 N. Y. 57;

Rhode Island vs. Massachusetts, 4 Howard 591.

Birdsall vs. Cary, 66 Howard Practice 358."

Under our statutes it runs in favor of the state as well as in favor of counties and other municipal corporations.

Consistent with the ruling of the Supreme Court in the case of *Wright vs. Mattison*, *supra*, the courts of the several states have many times held

that the void decree of a court may constitute color of title.

In *Brind vs. Gregory,* 53 Pac. 25, the Supreme Court of California holds:

"It seems that the respondents originally claimed under certain decrees of distribution and partition, and appellants now contend that these decrees were invalid, but whether or not these decrees were erroneous at the time they were entered, they certainly afford the foundation for the acquisition under them, by respondents, of title by advedse possession, and we see nothing in the record to warrant us in overruling the findings of the Court to that effect."

Also see:

Packard vs. Johnston, 4 Pac. 632.
Patton vs. Dixon, 58 S. W. 299.
Reedy et al. vs. Canfield, 42 N. E. 833.
Wright vs. Stice, 51 N. E. 71.

Presumably the allegations of plaintiff's complaint upon the question of adverse possession, like all other allegations made by him, are as favorable to his contention as it is possible to make them. At no place in the complaint is the allegation made that the acts of the county with reference to its possession of this property are subordinate to a superior title; at no place is it alleged that these several acts were not adverse, or that the county has not remained in the open, notorious and continued possession of the property, at all times, since the several acts mentioned. If not true strictly as to some allegations made in the amended complaint, the statements are all true as to the admissions made

in the original complaint as to the possession exercised by the county. It is first alleged:

"That after the entry of said decree, the land above described was marked upon the assessor's roll as county property and as exempt from taxation, and has ever since been so treated, except certain portions thereof hereinafter described, which the defendant has assumed to convey to private parties by deed."

In Section VI of the Organic Act, creating the territory, it is declared:

"And all taxes shall be equal and uniform, and no distinction shall be made in the assessment between different kinds of property, but the assessments shall be according to the value thereof."

There are also legislative enactments providing that all property should be taxed, and when statehood followed it was provided in the fundamental law (Sections I and II, Article 7) that:

"The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

Now, the property involved in this case could under no theory be exempt from taxation, unless it was public property. The act, therefore, of the taxing officials of the county in placing it upon the rolls as public property is consistent only with the theory that the county owned it and every interest

in it. If a private property right existed in it and was acknowledged by the county, it would have been the duty to have taxed it and compelled it to bear its share of public burdens. The act of placing it upon the tax rolls was an open and plain avowal of ownership, inconsistent with any other theory than that the county held absolute title. It has been an act of possession under color of title consistently maintained by the county from the date of decree to the present time. If the county had done nothing else than make its plain avowal of ownership, its right to protection under the statute of adverse possession would now be complete.

It is alleged, however, that in 1885 the county took physical possession of a certain portion of the tract of land known as "King County Farm," and has always occupied and remained in such possession.

In paragraph IX it is alleged that all claims to said land by defendant in error in reference to said land, and all control exercised or attempted to be exercised by defendant in error over said land, have been made, done, performed and exercised under and by virtue of said null and void decree above described. In other words, it is clear from the allegation of the complaint that as to the part described herein as the "King County Farm," as well as the other several tracts later mentioned in the complaint, the county went into possession of it by virtue of the decree and hence, as we contend, under color of title. It is not alleged in reference to the possession of the "King County Farm" that we in any way disclaimed our interest as to the remainder

of the property, and the allegation of the complaint as a whole would warrant only a contrary inference.

It is further alleged that about 1900 the defendant in error took possession of a portion of the tract of land involved, and proceeded to erect a county hospital upon it, and "that the defendant in error has placed upon the last described tract of land valuable improvements in the shape of a hospital building and its appurtenances," and that at all times since that date it has used this tract of land for county hospital purposes. (The disclaimer of plaintiff in error as to said improvements should be disregarded. The rights of the county have attached and no offer of plaintiff in error can destroy or affect them.)

It is also averred that in 1892 the defendant in error platted a certain part of the property acquired by the decree, calling it the "King County Addition to the City of Seattle," and after filing said plat with the county auditor of King County, proceeded to sell a large portion of it to private individuals. That in 1903 the defendant made a plat of another portion of the property, called "King County Second Addition to the City of Seattle. whihch was placed of record and has been selling to private parties the lands of this addition also. It is also alleged that as to all parts conveyed the county has proceeded to tax the same upon the theory that the lands, since the conveyances, belong to private parties.

Now, these several described tracts, when taken together, "comprise the whole of the tract herein first above described as being the property belong-

ing to Lars Torgerson Grotnes," so that by the allegation of plaintiff's complaint, all of the property involved has been actually improved by King County. The county in the years gone by, at one time or another, has assumed the actual physical control of the entire tract, which control has been open and notorious. It is not alleged at any place that the control by the county has not been exclusive and adverse, and applying the ordinary rules of construction to the pleadings of the plaintiff in error, the Court must hold from the facts set out that the acts of the county pleaded can be consistent only with the avowal upon its part of an absolute ownership. They were notorious acts because all made a matter of public record, or because the county was in physical possession. The natural inference and presumption would be, the county having exempted the property from taxation, and having proceeded with the expenditure of large sums of money for its improvement, in clearing it, and erecting buildings on it, and in the use of it as a hospital for its poor and the cultivation of it as a poor farm, that it was asserting an ownership exclusive and adverse to the world.

In *Costello vs. Edson et al.*, 46 N. W. 299, the Supreme Court of Minnesota decides a case which seems of value here. In that case the party made pretensions that he was the owner of a tract of ground for several years, but did nothing more than to cut down brush and grub the stumps off from certain parts of it. He did not live on it during the time. These acts were begun by him in 1863, and it was not until 1870 that he erected a building upon the property and went into actual possession

of a portion of it. Within twenty years from that time an action was brought to recover, but the court held that the several acts of improvement done prior to 1870, coupled with the payment of taxes, showed that during this period, though before actual occupancy, the party was asserting adverse ownership. The Court, upon the presumption arising from the making of improvements, says:

"The construction of buildings upon the land, enclosing it with fences and the like, have always been regarded as significant acts of adverse possession, because such occupancy is of a character well calculated to inform the owner both of the fact of possession and that the intrusion is not intended as a mere temporary trespass. They are acts which ordinarily one would not be expected to do upon the land of another, thus contributing his own labor or property to the benefit of another the land owning, but are such acts as one owning the land, or deeming himself to be the owner, may be expected to do in the permanent improvement and enjoyment of his own estate. Upon their face they manifest a use, possession and dominion assumed over the land itself naturally distinguishable from a mere trespass on the land."

How much stronger are the several acts plead in the complaint, favorable to defendant in error than those before the Minnesota Court. One might pay the taxes upon another man's property upon the theory that the law would permit him reimbursement, but the exemption of a piece of property from taxation by a municipality is consistent only with one theory, and that it is public property and exempt from taxation. As to all of this property, therefore, the county has assumed and asserted acts of adverse possession which, if the statute has run,

will make perfect title. The several acts appearing on the face of the complaint should be given force by the Court as a matter of law.

Subdivision 1, Section 26, Laws of 1869, page 8, provides that actions for the recovery of real property or for the recovery of the possession thereof, must be brought within twenty years:

"And no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within twenty years from the commencement of the action."

The period of limitation described by this act was reduced by act of the territorial legislature of December 1st, 1881, to ten years (Section 26, Code of 1881), and such, for general purposes, has been the period ever since.

We deem the following well-settled principles conclusive:

In 1 *Cyc.*, page 1146, it is stated as a general rule:

"That one who enters upon land under claim and color of title is presumed to enter and occupy according to his title."

Now, the county entreing with color of title, any act of possession done by it would relate not only to the part actually embraced by such possession, but would be an act co-extensive with the boundries described in the instrument giving it such color of title. The probate decree describes the entire tract.

In 1 *Cyc.*, page 1125, the rule is stated:

"The general rule is well settled that where a party enters under color of title into the actual occupancy of the premises described in the instrument giving color, his possession is not considered as confining to that part of the premises in his actual occupancy, but he acquires possession of all the land embraced in the instrument under which he claims."

This presumption stands unrebutted by any allegation of plaintiff's complaint; on the contrary, it is strengthened by every fact set up. The exemption of the property from taxation, the subsequent improvement by the expenditure of large sums of money, the platting of all the remaining tracts not embraced within the part of which the county took possession in 1885, backs up the theory, and the presumption of law, that the act of possession in 1885 must be construed, not to relate merely to the part actually covered by the King County Farm, but to the entire tract described in the decree. The public authorities could only improve this property upon the theory that they were the owners of it; the public money could not lawfully be expended except upon such theory. The court will not hold that the public authorities have disregarded the plain provisions of the statute relative to the expenditures of public money, on property, which the county did not own. As a matter of fact, outside of the allegations and admissions made in the complaint, the county has built many public highways in and about this property which enhances its value; it has paid large assessments for local improvements, upon the theory that it was the owner of the property.

In the case of *Blaine et al. vs. Hamilton*, 64 Wash. 353, the State Supreme Court upheld the King County harbor bond issue of $1,750,000, of which sum $600,000 was voted for the purpose of building a ship canal past the property involved in this suit. Other great expenditures have been made by the county upon the theory that it owned this property and that its money was being spent to enhance the value of its holdings.

No excuse is made for the long delay; no fraud is charged with which stay the statute of limitations; no reason is given why the plaintiff in error did not discover his cause of action before. There is absolutely no allegation of any act of diligence or of inquiry. It is said that Thompson left his relatives in 1849, and that until within three years of the filing of this complaint they had no knowledge or notice of his death, or of any of the facts and circumstances connected with the probation of his estate. A man is presumed dead if he remains unheard of for a period of seven years. Thompson left his relatives and went to a new and undeveloped country. What becomes of this presumption? Does it not charge his relatives with some inquiry and acts of diligence? Sixty-eight years went by from the time of his disappearance until the time of the disscovery, all unexplained.

By familiar rules of pleading (*Wood vs. Carpenter*, 101 U. S. 143; 24 L. Ed. 807) acts of diligence must be pleaded; the time of the discovery of the cause of action must be pleaded, the circumstances under which it was discovered, and explanation made why it was not discovered sooner. If the

complaint fails to show any of these elements it is open to the defense by demurrer. Under our state statutes, fraud and concealment are the only elements that will stay the running of the statute. Fraud alone is not sufficient. There must be acts of concealment which prevent discovery. It has been held that the means of knowlewdge is the equivalent of knowledge, and in this case what possible excuse can there be when all of the acts were matters of public record, open and notorious. The filing of the decree was notice to the world. The act of declaring this public property and exempt from taxation was a notorious avowal of the county's ownership. As said in the case of *Broderick's Will,* 21 Wallace 503, 22 L. Ed. 599, *supra,* absence from the state, ignorance from any conditions, no fraud being charged, will not stay the statute.

"Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up the right to open up the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes under which they are subject. This is the foundation of all judicial proceedings *in rem.*"

Ignorance without fraud has never been approved as an excuse. Absence from the state; lack of knowledge will give no protection.

Naddo vs. Bardon, 47 Fed. 782.
Elder vs. McClosky, 70 Fed. 529.
Manning vs. San Jacinto Tin Co., 9 Fed. 726.
Norris vs. Gaggin, 28 Fed. 275.

The necessity for diligence rested upon the plaintiff in error and not upon the county.

Judge Taft, in the case of *Elder vs. McClosky, supra,* uses this language:

"It would be a new doctrine, indeed, if persons in possession, under a most notorious, distinct and explicit claim of title in fee, in order to make their possession adverse to all the world, were bound to show the use on their part of due diligence in hunting up unknown heirs and their failure to discover them."

The truth of the matter is plaintiff in error and the other alleged heirs never used any acts of diligence; they did not discover; their conduct has been passive for more than half a century. How they came to make the discovery is not explained. We may assume they woke up with a start, when the psychological moment came, though it is said, it took three years' effort, after discovery, to fully realize the possibilities that stood before them.

Statutes of limitation are not frowned upon; they are to be enforced upon every occasion possible. They charge a party with diligence, they do not permit him to wait for a period of forty-seven years until all of the witnesses are dead who might oppose his theory, and then permit him to come into court and for the first time make known his claims. Certainly the strongest ground conceivable is present before the court in this case. In the first place, it is alleged that the property involved has increased from a value of $2,500 to the enormous sum of $300,000. As a matter of fact, its value is greatly in excess of this latter sum at the present time. The

great increase in value through the lapse of many years has been brought about through the public improvements that hase been placed upon it, and the uses to which it has been put. Its long exemption from the public burdens of taxation will give plaintiff in error rights which no other man ever enjoyed with reference to property situated like this.

The county has assumed to act and assert its ownership. It has conveyed large parts of this land to innocent purchasers, who thought that the county was selling its property. If plaintiff in error succeeds, these purchasers will be ushered into court to defend that title by some of the alleged heirs. This suit is only one of many others that can follow, if plaintiff in error is successful.

If the county's title has not been made complete by the long lapse of time at this date, no lapse of time could make it so. If this suit can be maintained by plaintiff in error, it could be maintained by his posterity a hundred or a thousand years hence. Instead of being a statute of repose, and rest, the statute of limitations becomes a statute inviting delay and opening the door to perjury and fraud. If plaintiff in error had waited a few years longer, every witness available to the defendant in this case would be dead. Many defenses open to King County at the time these transactions took place, have been lost through the lapse of time. By plaintiff in error's theory of the statute of limitations, the title of the county was lost instead of protected.

Every dictate of sound public policy would

seem to command that this defense would be available upon the face of this complaint. It will cost the county thousands of dollars to send representatives to Norway in its efforts to dig up evidence for its own protection. It will cost it much more now to defend the suit than it would, if plaintiff in error had availed himself of those public records which were open to him in 1869 as they were when his alleged discoveries were made.

There is another statute of limitation which we think bars the rights of plaintiff in error. We have previously referred to Chapter 133 of the Laws of 1907, page 253, dealing with escheats.

"Sec. 2. Such estates shall be administered and settled in the same manner as other estates. If at the expiration of eighteen months after the issuance of letters of administration no heirs shall have appeared and established their claim thereto, the court having jurisdiction of such estate shall render a decree escheating all the property and effects of such decedent to the State of Washington."

Hence the heirs must appear and claim the estate with eighteen months after the issuance of letters of administration. If they fail to appear by such time, the property escheats to the State of Washington. This provision fixing a limit on the time we consider mandatory.

In *State vs. Stevenson, supra*, the Supreme Court of Idaho held their statutes mandatory, and at the expiration of the time prescribed, disqualified the heirs from taking the property. Why should this statute of limitation not be made applicable to hte alleged heirs of John Thompson, assuming plain-

tiff in error's contention is correct that no valid decree could be entered by the probate court. We think that a fair construction of this statute would prevent plaintiff in error from now appearing and claiming an estate unless the date was within eighteen months from the time this statute became effective. It at least shows the sense of the legislature of the evils to be feared if such matters are left open indefinitely. It conforms generally with the conception that there must be an end to claims of this character and that titles should become fixed, and when once adjudicated remain staple.

In 1893 the legislature passed an act reducing the period of limitations to seven years under certain conditions. This is a statute covering payment of taxes.

> *Laws of 1893*, Chapter 20, Section 1, *et seq.*; *Remington & Ballinger's Code*, Sections 786, 787, 788, 789, 790, 791.

Ever since the decree of the probate court the property involved in this action has either been vacant or occupied land. In either event, if the statute be applicable, defendant in error is entitled to the protection of the seven year period of limitation.

The legislature, in the act in question, made special provision that the same should be liberally construed to obtain the purposes sought. Now King County has had a right to tax any private interests in this property, if same has existed. The exemption of the property from taxation on the theory that it belonged to the county, has thus forced the

county to stand for the loss of the taxation of it, or, in other words, the county has taken care of the taxes and paid same through all the years. What would have become of this property, had the county exercised its right and taxed the same or any interests of plaintiff in error therein? It is manifest that it would have been sold and the title conveyed years and years ago for non-payment of these taxes. We think that from all standpoints this statute should be considered by the court in passing upon the effect and protection which lapse of time has worked for defendant in error.

PROPOSITION "C".
LACHES.

Plaintiff in error is now estopped by his laches and procrastination from maintaining this action.

We believe that under the decisions laches is available as a defense to this action. It has been applied by the Supreme Court in cases of ejectment.

Kirk vs. Hamilton, 102 U. S. 568; 26 L. Ed. 79;
Dickerson vs. Colgrove, 100 U. S. 578; 25 L. Ed. 618.

We have previously argued at length the facts upon which a claim to laches would be based. Lapse of time is the essence of laches. There are other elements, all of which we are able to present in this case. The great change in the value of the property; its exemption from the public burdens to the injury of the county; the vast improvements made upon it by the county, all done in good faith, in reliance upon the decree of the court and the title therein conveyed, would seem to make perfect the defense. Lack of knowledge on the part of plaintiff in error is no defense to the charge of laches, for the source of knowledge was available to him. As stated, every fact connected with the matters involved in this suit have been of public record for forty-three years. They were as open to discovery in 1869 as they were at the time the alleged discovery was made. Plaintiff in error has stood by (for if he did not know the facts it is his own fault) and let the county spend its money in reliance upon its title. His claim, stale, ancient and without con-

science, is now presented for the first time. With apparent glee plaintiff in error now says you cannot urge the defense of laches against me because I have brought this action in a Federal court and it cannot be urged as a defense in an action at law. It would be different if this action had been brought in the courts of the State of Washington, but whether plaintiff in error can thus escape depends upon rules of practice over which the state laws have no control. Defendant in error contends that the unexplained delay, and procrastination, amounts to an estoppel and bar under the facts set up, and hence, is available as a defense. Plaintiff in error should be estopped from now presenting his claim, and his estoppel becomes part and parcel of the title of defendant in error.

We submit this defense asking the court to give it the careful attention which it deserves.

CONCLUSION.

We express the fullest confidence that this suit cannot be maintained. It is not for us to pass in judgment upon the case, but we cannot take it as seriously endangering the title of the county. At every turn, it looks as if plaintiff in error runs helplessly into statutes of the clearest meaning, and decisions by the courts grounded upon the soundest logic. He cannot turn in any direction and escape the effect of the fixed construction of the statutes, which have become rules of property in the State of Washington. Every avenue has been effectively closed. The whole case seems founded upon vain, but fond hopes, actuated by a large and keen desire.

Surely no court will sustain the far-fetched contention that the Organic Act creating the territory, contained restrictions prohibiting the territorial legislature from legislating on the subject of escheats, and from granting jurisdiction thereover to the probate court.

The claim that the law of escheats passed by the territorial legislature of 1862, interferes with the "primary disposal of the soil" is impossible, because it is clearly contrary to the purpose of Congress in inserting the restriction in said act. Plaintiff in error can find nothing in the Organic Act or the Constitution of the United States, to which he can tie his case and stand fast. His suit resembles a wreck, storm tossed by the waves, and close to the rocks, without a safe or successful anchorage.

His position is no better when it reaches the territorial statutes and records made in the probate court. That court acquired jurisdiction to probate the estate, and to dispose of it, pursuant to the provisions of law. The statutes made provision for succession by the county in the event the heirs at law, if any there were, fail to appear and claim the estate. The heirs were given the notice specified by the statute through publication in the manner required. The estate was probated and closed in the same manner that estates have been probated and closed, and property distributed by the courts of the territory, and State of Washington since 1862. The interpretation of the law, by virtue of which this was done, has been followed by the courts, and the bar, and acquiesced in as settled by the public, for three score years. This construction of the statutes

is clearly correct, and should not, and will not be upset, at this late day, to the wanton destruction of titles firmly fixed, and of estates long settled and enjoyed.

This court will not attempt to do what Congress from 1853 to 1889, apparently with a purpose, failed to do, that is, disapprove the territorial statutes upon which the title of plaintiff in error, and others claiming through probate proceedings, rest. Neither will this court set aside and destroy the decree of the probate court made in the discharge of its lawful functions, and the exercise of its original and exclusive jurisdiction, to settle and adjudicate the title of the property of John Thompson, deceased. To do so would upset every title in the State of Washington based upon the statutory notice given to the heirs in this case. It is no fault of the county that Thompson left his relatives and changed his name, or that his relatives, living far away, heard nothing of his death. Remoteness from the place of his death, and the court where his estate was probated, cannot break the world wide effect of the statute providing for constructive notice. Service of this character upon those claiming an estate is an incident to probate jurisdiction and is essential to the administration of the probate law. It cannot be taken away, or its effect destroyed.

The failure of the heirs to appear and claim the estate can make no difference, as it adds nothing to the legal status of their claims. The probate court, vested with jurisdiction, found according to the facts before it, and its finding that Thompson died intestate, and without heirs, becomes conclusive, as does the application of the law by the pro-

bate court to the state of facts decreeing the escheat, become the rule of decision for all purposes. Right or wrong, it must now stand; after all is settled plaintiff in error cannot invoke the aid of another tribunal to dig up and destroy these transactions. This suit is a collateral attack upon the probate decree, and cannot be maintained; the issues involved were all settled by a court of competent jurisdiction whose decree is now *res adjudicata*.

Beyond the decree of the probate court conveying a perfect title to King County, comes the statutes of limitations. Not once but many times, have these statutes by the long lapse of time, raised their bars to this suit of plaintiff in error. Plaintiff in error may juggle allegations in his complaint in an effort to secure a rule on demurrer, that would sustain an issue of fact, when made before a jury, but from all the circumstances plead, it appears that King County has been in the open, notorious, adverse and exclusive possession of the premises for the period required by the statutes, and that a fair construction of all the circumstancese require a holding that limitations have run and the suit is barred. No case such as this has ever been sustained by a court. It is inconceivable that the court will hold the county is not entitled to the protection of the several statutes of limitation.

There is nothing in the case that would tend to arouse sympathy for the claim presented. It is ancient, and stale, and the law naturally meets it with a frown. To entertain a suit of this character invites speculation with fraud, and stirs up litigations over issues long settled. The witnesses who lived at the time of Thompson's death are nearly

all gone. The probate judge is dead. The administrator is dead. The members of the Board of County Commissioners in office at said time, and the prosecuting attorney, are all dead. The witnesses who still survive have but a dim memory of Thompson, and all the facts are shrouded in a haze. If this suit can be maintained it might now be impossible for a court to arrive at the truth, or, what is worse sometimes, in litigation over ancient lineage, prevent the perpetration of a fraud. The truth should have been called for at a time when the lips of these witnesses could have told it. The graves of those who knew John Thompson will not yield it up. We pray that the judgment be affirmed.

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IN THE

United States
Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THOMAS CHRISTIANSON,
Plaintiff in Error,

vs.

THE COUNTY OF KING,
Defendant in Error,

ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION. HON. FRANK H. RUDKIN, Judge.

Reply Brief for Plaintiff in Error

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Reply Brief for Plaintiff in Error

TO THE HONORABLE JUDGES OF SAID CIRCUIT COURT OF APPEALS:

There are some matters contained in the brief of defendant in error which we think require further comment on our part.

FIRST

Counsel dispute our statement that it is necessary that there should be an inquest of office to terminate the presumption of heirship before property can fully escheat to the sovereign. In support of their view, they cite certain cases, the language used in which would seem at first glance to hold as they contend, but a careful examination of all the authorities will show that they can be divided into two classes, the difference between which consists in who is the person raising the question of the sufficiency of the sovereign's title by escheat. If a person dies and no heirs appear upon the scene, the sovereign has a perfect right to take possession of the property as against all others, except those claiming under the decedent, and take care of the property until in due course of law an inquest of office can be had, and then after such inquest of office, the title of the sovereign is good as against the whole world, including the heirs of the decedent, the presumption of whose existence has been destroyed by the inquest of office. If a careful examination is made of the cases (and we have tried to make one), we think it can be safely stated that in every case where it has been held that no inquest of office was necessary, it has been some person

claiming under a strange title who was contesting the title by escheat, and it was held that the sovereign or the person claiming under him, could establish the title by escheat by proving the non-existence of heirs without showing that there had been office found. But in every single case where the person challenging the title by escheat has been the heir (as in the case at bar), or someone claiming under him, it has been held that an inquest of office was necessary.

We are indeed astounded at counsel's citation in support of their contention of the case of Hamilton vs, Brown, 161 U. S. 261 (their brief page 36). They quote the exact language which sustains our position, and which we would have quoted had we not deemed that we had presented the Court with sufficient authorities upon this question. In the quotation that counsel have made, it is expressly held that at common law, the king's title was not complete without judicial proceedings to ascertain the want of heirs and devisees. The court then proceeds to describe what was the method of procedure in an inquest of office, and it then says: "In this country, when the title to land fails for want of heirs and devisees, it escheats to the state as part of its common ownership, either by mere operation

of law, or upon an inquest of office, according to the law of the particular state."

This simply amounts to saying that a state has a right to abolish inquest of office if it sees fit; that if the state law provides for inquest of office, it must be had, and if the state law is silent upon the subject, and the common law is in force in that state, then also an inquest of office must be had. In the Territory of Washington, there was a law providing that proceedings to escheat property should be brought by the prosecuting attorney by an information filed in the district court and so under the law as laid down by the Supreme Court of the United States in said case of Hamilton vs. Brown, an inquest of office in pursuance of such statute was necessary. Counsel claim that this statute was repealed (which we dispute), but if that were so, they would be in no better position since the common law was in force in the territory, and if this statute were repealed, such common law would be in full effect as no other procedure was substituted for the one which they say was abolished.

But this statute which prescribed a procedure for the escheats never was repealed. The statute of 1854 provided that an information should be filed by the prosecuting attorney in the district court

"whenever any property shall escheat or be forfeited to the territory for its use". The law of 1862 to which counsel refer was a revision of the Civil Practice Act, and when it came to this subject matter (Section 519 of the later act) it simply left out the words "escheat or", leaving the law to read "whenever any property shall be forfeited to the territory for its use". Technically there is a difference between the meaning of the words "escheat" and "forfeiture", though the word "forfeiture" as used in the vernacular includes both. The Supreme Court of Montana in Territory vs. Lee, 2 Mont. 124, and the Supreme Court of the United States in Church etc. vs. United States, 136 U. S. page 1, use the words as though they were synonomous, and so do many of the other courts. If this court holds that the word "forfeiture" is broad enough to include both, then of course the Act of 1862 is simply a repetition, a re-enactment of the law of 1854, and this doubtless is what the legislature meant. Counsel in their brief (page 54) say: "An escheat is not a forfeiture, nor analogus thereto". If they are right in this statement, then the statute of 1862 does not deal with the subject of "escheats" at all, and therefore as it is silent in regard to that subject matter, certainly does not repeal the previous matter on that subject passed in

1854. There is no specific repeal of the law of 1854, and the repealing clause which they cite does not in any manner help them. It reads: "All acts or parts of acts heretofore enacted upon any subject matter contained in this act, be and the same are hereby repealed". This does not designate any specific acts, but still leaves it open to construction as to whether the act in question or previous acts refer to the same subject matter or not. If the word "forfeiture" in the act of 1862 is broad enough to include escheats, then it was simply a re-enactment of the law of 1854. If it is not broad enough to include escheats, then the subject matter of "escheats" is not contained in the act, and therefore it does not repeal any previous law upon that subject, and the law of 1854 still remains in full force. But supposing that the law of 1862 by implication did repeal the law of 1854, it would then leave the common law in force in the territory and the county would find itself in the same position, in that an inquest of office would be necessary. We refer the court for this latter proposition, that an inquest was neccessary under the common law, to this very case of Hamilton vs. Brown which counsel have cited, and also to the other cases mentioned in our first brief.

SECOND

In our brief (page 41, et seq.) we contended that the whole of the probate proceedings in the territorial probate court were void, because the only pretended petition for letters of administration upon which the proceedings were based, was a written request from a couple of strangers to the court to appoint another stranger administrator. It was defective in law, in that it failed to state the decedent's residence, the existence of assets, the *situs* of assets, the intestacy of the decendent and the right of the appointee to the appointment. It was defective in all these respects, each one of which has been held a fatal defect in the authorities which we refer to in our first brief, and which are contained in Vol. 18 of Cyc, page 122. The probating of an estate is a proceeding *in rem,* and the petition which starts the proceeding, is what gives jurisdiction, and if it does not comply with the law, the whole of the proceedings are null and void. This is elementary. It is claimed by counsel that the validity of these proceedings cannot be attacked colaterally. In this they are certainly mistaken. We have not the book before us, but your Honors will find it laid down distinctly in the first chapter of Van Fleet on Coll-

ateral Attack, that all judicial proceedings are subject to colatteral attack where such attack is based upon the lack of jurisdiction upon the part of the court. This is almost always so where the lack of jurisdiction is that of the person, but it is so without any exceptions where the lack of jurisdiction is that of the subject matter, and in this point which we are making, we are attacking the court on the ground that it never obtained jurisdiction over the *rem*, which was the estate of Thompson. Had the court obtained jurisdiction, then we frankly admit this court could not inquire into the question of whether its proceedings were erroneous or not. Errors could only be corrected by appeal. But we are not seeking to correct any errors. We simply claim that the whole proceedings are an absolute nullity.

THIRD

Our contention (Brief page 53 et seq.) that all acts of the county in taking possession of this land infringed the constitutional inhibition against confiscation of property without making just compensation, has been completely misunderstood by counsel. They must have read it in terrible haste. They seem to think we were invoking a different clause

of the constitution referring to "due process of law". There is a portion of our brief where we claim that the proceedings in the probate court were not due process of law, but that proposition was not being discussed at this place. What we were claiming (and we have James Kent as an authority to back us up), was that any act that the County or its officers might do in court, out of court, with their hands, their feet, their tongues, or in any manner whatever, or in any place whatever, the purpose or object of which was to get possession of this land and appropriate the same to the county's use, would be absolutely null and void and of no legal effect, and no rights could be based or predicated upon it, because it was in disobedience of the provision contained in the Fifth Amendment to the United States constitution forbidding the taking of private property for public use without making just compensation; and for a private use, certainly the County had no right to take it.

FOURTH

We feel it our duty to call attention to some of the very peculiar things as they appear to us, in counsel's brief.

1. On page 13, they boldly state that every

territory has passed acts assuming to appropriate escheated property to itself. We cannot admit this to be correct. If such laws have been passed and held valid by courts of competent jurisdiction, it is incumbent upon counsel to refer us to the cases. We cannot take their word for it, particularly as in this connection they boldly cite the case of Territory vs. Klee, 1 Wash. 183 as sustaining the power of the territorial legislature to enact laws upon the subject of escheats. In this case, instead of so doing, the court does not pass upon the question at all, but evades it, and expresses a doubt whether it is so. The case went off upon another point as to what county an administration should be taken out in. After disposing of the case upon that question, the court refers to the question we are discussing as follows:-

"But we will here state that we are of the opinion that IF THE TERRITORY IS THE OWNER OF THE LAND, the title vested in it immediately on the death of Gilbert, without the aid or intervention of the probate court" And in that case it can recover the possession of the land, like any other owner, by an appropriate action in the proper court"

It will thus be seen that instead of deciding what counsel say it does, the Supreme Court of Washington in this case expresses a doubt as to

whether the land would escheat to the territory. Besides, this decision is an additional authority that an inquest of office is necessary before the title could completely vest.

2. On page 9 of their brief, and at other places they cite the allegations of the original complaint in this case as though such allegations were admitted facts now before the court. This is certainly novel. We do not understand it. We had always supposed as a matter of law that when an amended complaint was filed, it took the place of the original, and that from that time on the original complaint was out of the case.

3. On page 75 of their brief, counsel seriously argue to this court that it should apply to the decree of the territorial probate court entered in 1869, a statute of the state of Washington passed in 1907. We do not know how to answer this kind of a contention.

4. At another place, counsel invoke the protection of the so-called seven years' statute of limitations which requires the existence of three elements to constitute a bar: (1) color of title; (2) possession, and (3) payment of taxes. Of course we claim there is no color of title but it is indisputable that

there never was any payment of taxes by the defendant. This court can no more apply the bar of this statue with one of the elements lacking, than it could amend the statue by adding an additional element not therein mentioned.

5. On page 7 of their brief, and on pages 70 and 71, counsel admit that they are going outside of the record. In many other places they do it without saying anything about it, but here they admit it. What does this mean? The writer was deputy clerk of the Supreme Court of Illinois in 1879 sitting at Ottawa when that Court sent for an attorney to come down from Chicago, and after severely reproving him for having submitted a brief nearly one-half of which was outside of the record, told him that if he ever repeated the offense, they would disbar him. We know that in the heat of advocacy, counsel will sometimes stray, but to do it deliberately passes our comprehension.

Of the same character are the slurs and covert insinuations on pages 73-74. It is certainly a peculiar style of argument to cast reflections upon the existence of facts which are admitted by demurrer.

6. Counsel's pathetic complaint because the County has lost 43 years' taxes is laughable. The

income and benefit derived from this property by the County in the last year would from fifty to one hundred times over pay all the accumulated taxes of the whole 43 years since the estate of Torgerson alias Thompson, was closed out and the County took control of the property.

Equally laughable is counsel's talk about the ancient and stale claim and litigation over ancient lineage. All the transactions involved in this case have occurred within the lifetime of all of your Honors. The plaintiff belongs to the next generation of his family following that of the decedent, being a son of his sister and old enough so that as a little boy he could well remember his uncle before he left home. But we must check ourselves and not be provoked into following counsel's bad example of going outside of the record.

Respectfully submitted,

EDWARD JUDD
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